Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WASANG TOMAS MOCK,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court commit reversible error when it deliberately delayed the execution of an arrest warrant against the Petitioner who was unrepresented by counsel until after he had provided testimony and did the court under these circumstances violate fundamental fairness and constitutional principles by failing to advise the Petitioner about his right to counsel and against self incrimination before allowing him to so testify.

2. Was the trial testimony given by the defendant under these circumstances involuntary and therefore inadmissible at his own subsequent trial.

3. Having allowed the Petitioner's testimony at the earlier trial to be heard by the jury did the trial court commit reversible error in violation of 18 USC 3501 by refusing to allow defense counsel to explore the circumstances of such testimony.

LIST OF PARTIES

The parties to the instant proceedings are Wasang Tomas Mock, Petitioner and the United States of America.

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To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States of America:

OPINIONS BELOW

The opinions of the District Court with respect to the issues herein were not officially reported, but are reproduced herein in Appendix's A, B & C.

The decision and Order of the United States Court of Appeals for the Second Circuit is not yet officially reported, but is reproduced herein in Appendix D.

JURISDICTIONAL GROUNDS

The Decision of the United States Court of Appeals for the Second Circuit affirming the Petitioner's conviction was rendered on February 17, 1994. The Petitioner is therefore timely filing this application for a Writ of Certiorari pursuant to Rule 13 of the United States Supreme Court Rules and the Jurisdiction of this Court is invoked pursuant to Title 28 USC § 1254.

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved in the case are the self incrimination clause and the due process clause of the Fifth Amendment to the Constitution and the Sixth Amendment to the Constitution involving the right to counsel.

RELEVANT STATUTES

The interpretation and application of 18 USC § 3501 is also involved in the instant petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner Wasang Tomas Mock was convicted along with two co-defendants Jorge Garcia and Raul Rodriguez of Title 21 USC § § 812, 841, 846 and Title 18 USC § 924 for allegedly participating in a crack and cocaine distribution enterprise and of weapons possession offenses. The Petitioner Mock was also convicted of perjury under 18 USC 1623 based upon

testimony he gave at an earlier trial of his co-defendants. The Petitioner was sentenced by the United States District Court for the Southern District of New York (Leisure, J.) to life imprisonment and a judgment was entered in that court on July 23, 1992. The judgment of conviction was affirmed by the United States Court of Appeals for the Second Circuit on February 17, 1994.

Co-defendants Garcia and Rodriguez were originally indicted along with one Pedro Valdez in December of 1990. Valdez subsequently turned government informer and entered into a cooperation agreement. On May 24, 1991 an arrest warrant was issued for the Petitioner Mock, alleging his involvement with Garcia and Rodriguez but the warrant was not immediately executed.

On July 23, 1991, a trial involving Garcia and Rodriguez commenced in the Southern District of New York before the Honorable Mary Johnson Lowe. During this trial the Petitioner Mock was called as a witness by the Defendant Garcia. At sidebar and in the robing room, the government informed Judge Lowe that there was a warrant for Mock's arrest. The court denied the government's request to execute the warrant immediately taking the position that executing the warrant would deprive the defendants of the benefit of Mock's testimony and that the defendants would have a "legitimate claim that the government prevented this man's testimony". (See Appendix A, A-3)

Judge Lowe thus stated:

> "I don't want him to be aware of the arrest warrant or any arrest take place before he has completed his testimony so as not to deprive the defendants of the benefit of his testimony".

> I don't want him to be aware that there is an arrest warrant for him until testimony is over. (A-9)

The attorney for the defendant Rodriguez, then made a general statement that the witnesses had been warned to hire an attorney although the attorney for the defendant Garcia appeared to dispute this and the record is unclear as to whether the reference was to Petitioner Mock or two other potential witnesses. (A-6)

The Assistant United States Attorney relying on the representations of defense counsel for Rodriguez informed the court that although Mock and other witnesses were not at that time represented by an attorney they had been told that "they might subject themselves to arrest if the came to court." (A-6)

The government eventually agreed to forestall Mock's arrest until Mock had

testified, and Judge Lowe made arrangements to have Mock arrested out of sight of the defendants or the jury once he had testified. (A-9, A-10)

Mock, who was not represented by counsel at the time, proceeded to testify on Garcia's behalf. He stated that he did odd jobs to support himself, denied being a drug dealer, had known Garcia for 20 years and had never known him to sell or use drugs, and had visited Garcia's apartment (which the government showed was the headquarters for the organization). Mock did testify that he was aware that there was "always a chance" of being arrested if he came to testify, but that he wanted to "clear his name."

At no time prior or during his testimony was Petitioner Mock ever advised by Judge Lowe that an arrest warrant had been issued for him and that

he had a right to obtain counsel or to exercise his right against self incrimination.

After his testimony Mock was immediately arrested outside the courtroom and at the ensuing second trial his testimony at the first trial[1] was admitted into evidence to support the perjury charges and to show that he had been in the apartment in which the drug operation was organized. In denying Petitioner's pre-trial motion to suppress, the trial court determined that there was no obligation to provide Miranda Warnings and that the testimony was not involuntary.

Further, during the trial, although the District Court admitted the

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[1] The original trial involving Garcia and Rodriguez at which Mock testified resulted in a mistrial after the jury deadlocked 11-1 for acquittal.

Petitioner's earlier testimony, the court did not admit the underlying circumstances under which the testimony was given, finding that Mock's lack of knowledge as to the arrest warrant was not relevant evidence.

The Second Circuit Court of Appeals while expressing the opinion that the district court "would have better exercised its discretion by ensuing that the petitioner was represented by counsel to caution him about the consequences of his testimony" determined that "ultimately Judge Lowe's actions were within her discretion" and that there was "no overriding obligation to inform him of the impending arrest warrant". With respect to the other issues the Second Circuit found that the Petitioner's lack of knowledge about the arrest warrant did not affect the voluntariness of his

testimony and that the District Court's decision to exclude evidence regarding the circumstances of the original testimony was not mandated under 18 USC § 3501 and was also not an abuse of discretion. (See Appendix D, A-70)

ARGUMENT

The Petition for a Writ of Certiorari should be granted because the issues involved are of a novel nature which have never previously been addressed by this court or apparently by any other court. The issues involve violations of concepts of fundamental fairness and constitutional principles as follows:

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DELIBERATELY DELAYING THE EXECUTION OF AN ARREST WARRANT FOR THE PETITIONER UNTIL AFTER HIS TESTIMONY AS A WITNESS AND BY FAILING TO ADVISE HIM ABOUT HIS RIGHT TO COUNSEL AND AGAINST SELF INCRIMINATION AND THE POSSIBLE CONSEQUENCES OF HIS TESTIMONY.

The Second Circuit below concluded that although several circuits have held that a District Court has the inherent discretion to warn a witness about his constitutional rights especially if the court perceives that a witness might incriminate himself. (Citing United States v. Arthur, 949 F2d 211, 215-216 (6th Cir., 1991); United States v. Silverstein, 732 F2d 1338, 1345 (7th Cir., 1984); cert denied 469 US 1111 (1985); United States v. Colyer, 571 F2d 941, 946 (5th Cir., 1978); United States v. Morrison, 535 F2d 223, 228 (3rd Cir., 1976), there was no overriding obligation to do so under the circumstances herein and that the trial court below was within its discretion to refuse to disclose to the Petitioner his impending arrest.

Under the circumstances herein, the instant matter cannot be treated as one which falls with the discretionary

authority of the court. Judge Lowe was specifically told that an arrest warrant for the Petitioner had been issued and that his arrest was imminent. She thereafter actively secured the postponement of the Petitioner's arrest until after his testimony and never took any steps to independently advise the petitioner about his 5th amendment rights or his right to independent counsel and to caution him regarding the possible consequences of his testimony. As the Second Circuit itself concluded:

> "we are troubled by the district court's choice to deliberately delay the execution of an arrest warrant to ensure a witness's testimony at trial. There is something vaguely inappropriate about the district judge arranging matters so that Mock's testimony on behalf of the defendants would not be jeopardized by execution of the arrest warrant. Although, Judge Lowe clearly had the interests of the

> defendants in mind, she disregarded the possibility that Mock's interests might need protection. (A, A-85)
>
> . . . . . .
>
> The District Court determination to withhold the information itself implicates concerns of fundamental fairness of the courtroom."

In determining her actions, Judge Lowe evidently chose to give priority to the Sixth Amendment Right of the Garcia and Rodriguez defendants over the Fifth and Sixth Amendment Rights of the Petitioner. Case law has clearly established the fundamental nature of the Fifth Amendment Right against self incrimination and that consideration for that right overrides Sixth Amendment concerns. Thus, in United States v. Goodwin, 625 F2d 693 (5th Cir., 1980), the Court aptly stated:

> "[A defendant has a Sixth Amendment right to compulsory process to obtain favorable testimony. Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). But this right does not always assure a defendant of the testimony sought. A valid assertion of the witness' Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights. United States v. Lacouture, 495 F.2d 1237 (5th Cir., 1974); United States v. Gloria, 494 F.2d 477 (5th Cir., 1974).

See also, United States v. Moreno, 536 F2d 1042 (5th Cir., 1976); United States v. Rodriguez, 706 F2d 31 (2nd Cir., 1983.

In addition, as long as there was no effort to actively encourage Mock not to testify, advising him of the existence of the arrest warrant and his imminent arrest as well as his right against self incrimination would not constitute a Sixth Amendment violation of Garcia and

Rodriguez rights. Thus, in United States v. Smith, 997 F2d 674 (10th Cir., 1993), the Court stated:

> "At the outside we note that Webb[2] does not stand for the proportion that merely warning a defendant of the consequences of perjury demands reversal.
>
> United States v. Harlin, 539 F.2d 679, 681 (9th Cir.) cert. denied, 429 U.S. 942, 97 S. Ct. 362, 50 L.Ed. 2d 313 (1976). To the contrary, as a general rule a court 'has the discretion to warn a witness about the possibility of incriminating' himself or herself. United States v. Arthur, 949 F.2d 211, 215 (6th Cir., 1991). Judges and prosecutors do not necessarily commit a Webb-type violation merely by advising a witness of the possibility that he or she could face prosecution for perjury if his or her testimony differs from that he or she has given previously. United States v. Gloria, 494 F.2d 477, 484-85 (5th Cir.) (en banc), cert. denied, 419 U.S. 995, 95 S. Ct. 306, 42 L.Ed 2d 267 (1974)."

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[2] Webb v. Texas, 409 US 95 (1972).

See also, United States v. Blackwell, 694 F2d 1325 (D.C. Cir., 1982), United States v. Touw, 769 F2d 571 (9th Cir., 1985); United States ex rel Robinson v. Zelker, 468 F.2d 159, 162, footnote 5 (2nd Cir., 1972); cert denied, 411 US 39 (1973); United States v. Matthew, 417 F. Supp 813 (E.D. Penn., 1976), aff'd 547 F2d 1165 (3rd Cir., 1976); cert denied 429 US 1111 (1977).

Similarly, in United States v. Davis, 974 F2d 182 (D.C. Cir., 1992) at page 187 the Court observed:

> "The Sixth Amendment is not implicated every time a prosecutor or trial court offers advice regarding the penalties of perjury. See United States v. Blackwell, 694 F.2d 1325, 1334 (D.C. Cir. 1982). Indeed, there are circumstances when warnings about the possibility and consequences of a perjury charge are warranted - even prudent."

In the case at bar, Judge Lowe had she informed the Petitioner of the existence of the arrest warrant and informed him of his self incrimination rights could have adequately protected his rights without being subject to a Sixth Amendment claim by the defendants Garcia and Rodriguez. Having failed to do so, she created a situation where Mock was severely prejudiced. Although, Mock during his testimony indicated that he was aware that "there was always a chance of being arrested" that is not the same as being informed that a warrant had already in fact been issued and that arrest was imminent. In fact, his comment that there is "always a chance of arrest" is an indication of his total unawareness of the imminence of his arrest. To allow a determination as to the disclosure of this information to a

potential witness to fall within a discretionary area rather than a mandatory obligation is not only against fundamental concepts of fairness but against public policy involving the orderly administration of justice. In the case at bar, Mock's earlier testimony was heavily relied upon by the prosecution to establish his guilt of both the drug offenses and the perjury charges and it indeed contributed greatly toward his conviction. If a different judge in the exercise of his discretion had decided that disclosure and warnings were appropriate herein, Mock may never have testified and no conviction could have resulted. To hold in effect that the Petitioner's life time incarceration is dependent upon one judge's discretionary view on a matter involving an issue as fundamental as the exercise

of Fifth and Sixth Amendment Rights flies in the face of constitutional guarantees of due process of law and the fair, equal and uniform administration of justice. The need for uniform treatment has been recognized in a situation analogous to the case herein. In United States v. Jacobs, 547 F2d 772 (2nd Cir., 1976), the court recognized the need under its supervisory powers to adopt a uniform policy with respect to the obligation of a prosecutor to advise a potential witness before a grand jury that he is a target of the investigation. The Court pointed to its duty to avoid "uneven justice" and stated at page 775:

> "It is an important function of the administration of criminal justice to let our citizens know that equal justice is available to all."

Similarly, there is a recognition herein that there was a need to properly advise Petitioner Mock and to protect his interests. Under the circumstances where the court is aware of a witness' imminent arrest, the need for disclosure and advise regarding possible self incrimination and the need for representation by counsel must be viewed as being a mandatory obligation of the court whose violation requires a reversal of any ensuing conviction.

II. THE FAILURE TO DISCLOSE HIS IMMINENT ARREST AND TO RECEIVE HIS MIRANDA WARNINGS MADE MOCK'S TESTIMONY INVOLUNTARY AS A MATTER OF LAW.

The test of voluntariness as set forth by this Court is whether a confession is the product of an essentially free and unconstrained choice by its maker or whether his will has been

overborne and his capacity for self determination critically impaired. See Schneckloth v. Bustamonte, 412 US 218, 223-227 (1973); Culombe v. Connecticut, 367 US 568, 602 (1961); United States v. Olmstead, 698 F2d 224, 226 (4th Cir., 1983). In determining this inquiry, three factors have been deemed to be relevant: (1) The conduct of law enforcement officers, (2) the conditions under which the interrogation occurred and (3) the accused's background. See United States v. Anderson, 929 F2d 96, 99 (2nd Cir., 1991).

In the case at bar, the Petitioner's ability to make an informed decision was critically impaired by the delay of law enforcement officials in executing the arrest warrant and then by the purposeful withholding of information regarding the warrant by the court until after he had

given his testimony. Judge Lowe in effect abandoned any role of neutral magistrate and specifically determined that no arrest or information about the pending arrest would take place prior to the giving of testimony. She in effect assumed a law enforcement role by orchestrating the time of arrest.

In United States v. Olmstead, 698 F2d 224 (4th Cir., 1983), and in United States v. Okwnabua, 828 F2d 950 (2nd Cir., 1987), the Courts indicated that silence where there was a duty to speak would suffice to make a statement involuntary.

In the case at bar, there was both a legal and moral duty on behalf of the District Court Judge and the Government to immediately advise Petitioner of the existence of an Arrest Warrant. Federal Rules of Criminal Procedure, Rule 4 (c)

(1) states that a Warrant of Arrest shall" . . . command that the defendant be arrested and brought before the nearest available magistrate." Rule 5 (a) states that "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available Federal Magistrate..."

In the case at bar, the Petitioner and the Government were in front of a Federal Judge who had knowledge of an Arrest Warrant. Indeed, the Government wanted to execute the Arrest Warrant prior to Petitioner's testimony. Clearly, the implication of the above Federal Rules is that Judge Lowe had a legal obligation to have the Appellant arraigned on the complaint which was the basis of the warrant in her own court or,

without "unnecessary delay", send Petitioner Mock to the Magistrate where he would have been advised of his rights. Instead, material facts were withheld from the Petitioner by Judge Lowe.

The conclusion of the Second Circuit and Judge Leisure in the District Court that the Petitioner Mock was aware of the danger of arrest and testified anyway, and that thus the actions of Judge Lowe did not make a difference in the outcome are totally misplaced. No where in the record is there any indication that Mock was directly advised about his right to have an attorney and in fact there is a specific statement by defense counsel for Garcia that Mock did not have an attorney. (A-4) In addition, the comment by defense counsel for Garcia that he had talked to all of them and told them they might subject themselves

to arrest specifically is made in reference to two other potential witnesses not Mock (See A, A-6).

Indeed, in the Government's Memorandum of Law in opposition to defendants Pre-Trial Motions, the government admits that its earlier representation to Judge Lowe that the witness was aware that there was an arrest warrant out for him was based upon their interpretation of the statement made by defense counsel for Rodriguez with reference to two other witnesses. In any event, any comments made by defense counsel for Rodriguez and Garcia must be viewed as being suspect and in a conflict of interest situation since the interests of the other two defendants in having Mock testify is directly in conflict with his interest in being made aware of the dangers of his imminent arrest. Thus, the Petitioner cannot be

said to have voluntarily exercised his free choice to make a statement being fully aware of the actual circumstances which existed at the time.

In addition, since Judge Lowe had specifically arranged for his arrest immediately after the testimony including discussions with a Marshall as to how it would be effectuated, the Petitioner was in reality in custody when he commenced his testimony. As a reasonable person, Mock would have known that he was not free to leave if he had been properly apprised of all of the facts involving his imminent arrest. His failure to be informed of this situation in effect made any statements rendered in his subsequent testimony involuntary.

III. HAVING DETERMINED THAT MOCK'S TESTIMONY WAS VOLUNTARY, THE DISTRICT COURT SHOULD HAVE AT LEAST PURSUANT TO 18 USC § 3501 (a) ALLOWED EVIDENCE REGARDING THE CIRCUMSTANCES OF THE TESTIMONY AND INSTRUCTED THE JURY TO GIVE SUCH WEIGHT TO THE TESTIMONY AS IT FELT IT DESERVED UNDER ALL THE CIRCUMSTANCES.

The District Court below allowed Mock's testimony into evidence because it concluded that his statements were voluntary. (A-29). The second circuit affirmed this conclusion. 18 USC § 3501 (a) specifically provides that:

> "If the Trial Judge determines that the confession was voluntarily made it shall be admitted into evidence and the Trial Judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. "

Case law has made clear that although the statutory section does not afford the defendant a second determination of admissibility, it does allow for defense evidence to be presented so that the jury can then render its determination as to the circumstances under which the statement was made. It has further been established that given the legislative history of the enactment, it should be given a broad interpretation, and the statute covers any self incrimination statements made or given orally or in writing including testimony. See United States v. Lucchetti, 533 F2d 28 (2nd Cir., 1976) (dealing with Grand Jury testimony). Thus, in United States v. Barry, 518 F2d 342 (2nd Cir., 1975), the Court stated at page 346:

> "Although it does not afford the defendant a second determination of admissability, however, §3501 does unequivocally require a specific charge on the issue of voluntariness. It will be difficult to imagine a clearer imperative than the statutory direction that the judge shall instruct the jury."

With respect to the legislative history of the statute, the court observed at page 347:

> "There is the added safeguard that the jury must be instructed to give the confession or statement the weight they feel it warrants under all the circumstances. The committee feels that society is entitled to the use of confessions and incriminating statements which are admitted only after passing the test of both Court and Jury under the above-described safeguards. The Committee also feels that a civilized society could not be more fair to persons accused of crime, as the Constitutional Rights of defendant's in criminal cases would be fully protected and respected by the safeguards in this proposed legislation."

> (Senate Committee on the Judiciary, 1968 U.S. Code Cong. and Administration, News p. 2112)

That the defendant is entitled to present evidence irregardless of the trial judge's finding on voluntariness is further evidenced by the court's statement to that effect in United States v. Kampiles, 609 F2d 1233 (7th Cir., 1979), cert denied, 446 US 954 (1980), involving a non-custodial admission.

In the case at bar, the Petitioner had relevant facts to place before the jury concerning the withholding of information concerning the arrest warrant, the fact that he was unrepresented by counsel nor advised of his Miranda Rights as well as possibly erroneous information given to him by attorneys for the other defendants. Thus, defense counsel for the Petitioner argued in the District Court:

> "I have the right to argue to this jury the voluntariness of my client's statement to bring out all such circumstances in front of the jury, including Judge Lowe's statement that he should testify without being told there is a warrant there. I have a right to argue that under the statute. I have a right to bring up voluntariness under 3501 to the jury, your Honor." (See Appendix C, A-59)

The District Court's precluding Petitioner Mock from introducing the facts and circumstance surrounding his testimony at the "first trial" is even more egregious since the District Court Judge allowed the Government to offer evidence showing that his testimony was indeed "voluntary", i.e.: the testimony of Special Agent Serniak where he testified that Petitioner Mock was called on behalf of the Defense and testified.

(T 1520)[3] Further, the Government, in summation, argued that Mock testified under oath knowingly and intentionally. (T 1692, 1833)

It is respectfully submitted that once the District Court Judge made the determination of voluntariness, the Appellant had an absolute right to be allowed to place his prior testimony in the proper context so that the jury could give such weight to said statement as the jury felt it deserved under all of the circumstances. In U.S. v. House, 939 F2d 659 (8th Cir., 1991), the Court of Appeals held that "Once the court makes a preliminary determination that the confession is voluntary, than the only requirement is that the defendant be

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[3] T refers to Minutes of Trial commencing January 7, 1992.

allowed to place the statements in context". [See also, U.S. v. Bloom, 865 F2d 485 (2nd Cir., 1989); U.S. v. Nash, 910 F2d 749 (11 Cir., 1990)].

The conclusion of the Second Circuit that 3501 (d) justified the exclusion of the proffered defense evidence in the case at bar, is totally misplaced. That section was merely designed to establish that the procedural requirements of Section 3501 relating to a preliminary determination by the Court did not apply to certain situations. It has nothing to do with the mandate that requires that once the issue of voluntariness is in the case and is before the jury, defense counsel has a right to present evidence on the subject. Thus, when United States v. Colon, 835 F2d 27 (2nd Cir., 1987), which the Second Circuit relied upon is carefully examined, it is seen that the

case relied upon United States v. Bailey, 728 F2d 967 (7th Cir., 1984). The Bailey case however specifically stated that Section 3501 (d) "waived the need for prior judicial determination as to pre-custody spontaneous statements". Bailey never meant to apply 3501 (d) as the Second Circuit did herein.

Since, the Second Circuit, clearly reached an erroneous conclusion with respect to the meaning and applicability of Section 3501 (d), which may effect numerous other criminal trials, it is imperative that this Court grant the Petition for Certiorari so as to review and correct the situation.

In the case at bar, the government made extensive use of Mock's testimony, especially to establish his presence in the apartment on the date of the alleged drug transactions and to prove their

perjury counts. The Petitioner was thus severely prejudiced by the erroneous ruling of the District Court and the District Court's failure to allow the Petitioner to introduce evidence as to the circumstances of his testimony is clearly not harmless error and requires a reversal as a matter of law.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully Submitted,

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APPENDIX A

DECISION AND ACTIONS OF DISTRICT COURT REGARDING DELAY IN EXECUTION OF ARREST WARRANT.

MR. EDELBAUM: I will get the first witness, your Honor.

THE COURT: All right.

WASANG MOCK,

Called as a witness by the defendant Garcia, having been duly sworn, testified as follows:

MS. NORTHUP: I have an application. Could we see you at the side bar?

THE COURT: Yes, you may.

(At the side bar)

MS. NORTHUP: I have a request that the jury be dismissed so the agents can execute a federal arrest warrant that they have for this man.

MR. EDELBAUM: I would object. You can execute an arrest warrant after he testifies.

THE COURT: I think so because if they execute it now, you will be depriving the defendant of a defense.

MS. MARTINEZ: Your Honor, if we could have a few minutes to consult with our appeals unit, because Mr. Mock might be making statements that would provide problems for him in the future. So if we could just have a few minutes to consult our appeals unit.

THE COURT: All right.

(In open court).

THE COURT: Jurors, let me send you out for a few moments. I have an issue I have to decide, and I have to hear the arguments of both sides.

(The jury left the courtroom)

THE COURT: Come up, counsel.

(At the side bar)

THE COURT: In view of this development, ask the marshal to sit outside the door, let the witness stay on the witness stand, and we will adjourn to my robing room with the reporter.

MR. EDELBAUM: Fine.

THE COURT: But do it quietly.

(In the robing room)

THE COURT: Here is the thing I am concerned about: If we execute the warrant prior to his testimony the defendants would have a legitimate claim that the government prevented this man's testimony.

MR. MARTINEZ, what is it you wanted to do?.

MS. MARTINEZ: Your Honor, I have requested a brief opportunity to consult with our appeals unit in view of the fact that Mr. Mock, there is a complaint charging him in connection with the same

case, he obviously has significant rights that might be implicated here.

THE COURT: Do you know if he has an attorney?

MR. EDELBAUM: He does not have an attorney.

THE COURT: You want a make a call?

MS. MARTINEZ: Yes, your Honor.

THE COURT: Any other bombshells for me?

MR. EDELBAUM: There may be.

THE COURT: Tell me about them while I am here.

MR. EDELBAUM: There will be two more people who will be testifying who were named as co-conspirators.

THE COURT: Do you know who they are?

MS. MARTINEZ: We have not learned. We learned Mr. Mock.

THE COURT: Do you know?

MR. EDELBAUM: Yes they are present. I don't want them arrested while they are here.

THE COURT: What I am asking, I am in a blind room, so to speak. I don't know their names and I don't know whether the prosecution has an arrest warrant for them.

MR. EDELBAUM: I don't now either, but if they are arrested --

THE COURT: The only way we can find out is if you tell us what the names are.

MR. EDELBAUM: I will, but I don't want them arrested while they are sitting in the witness room.

THE COURT: I understand that.

THE COURT: Isidro Rodriguez and Fernando Valera.

THE COURT: Is either of them represented by an attorney?

MR. EDELBAUM: No. I have talked to all of them, told all of them they might subject themselves to arrest if they come to court.

MR. TANNENBAUM: We told them to get an attorney.

MR. EDELBAUM: We didn't tell them to get an attorney.

MR. TANNENBAUM: I did.

MR. EDELBAUM: All right, you did.

(Discussion off the record)

MS. NORTHUP: Go ahead if he wants to testify. If he wants to testify we will cross him. Then we will execute the warrant. The witness is obviously aware at this point there is an arrest warrant for him. I would just request that there be a marshal posted.

THE COURT: I already asked someone to come.

MR. TANNENBAUM: The only question I have, your Honor, is, there are two other witnesses, as we just explained to your Honor, and to have them arrested in front of the other two witnesses would again damage -- scare the witnesses.

THE COURT: He doesn't have to be arrested in front of them.

MR. TANNENBAUM: That is what I am asking.

THE COURT: He can walk out of the courtroom and the marshal will be instructed to arrest him outside of the courtroom.

MR. TANNENBAUM: Fine.

THE COURT: That is outside of the presence of the other two.

MR. EDELBAUM: He was going to go back into the witness room. He brought

the other people down by car.

THE COURT: He drove them down?

MR. EDELBAUM: I think they all drove down together.

THE COURT: I can't help that, but I can prevent his arrest in the courtroom. Let him walk out so that it doesn't --

MR. EDELBAUM: Are there arrest warrants for the other two too?.

MS. NORTHUP: Who are the other two witnesses?

MR. EDELBAUM: I mentioned them.

MS. NORTHUP: I am sorry, I wasn't listening.

MR. EDELBAUM: Isidro Rodriguez and Fernando Valera.

MS. NORTHUP: We do not have arrest warrants for them.

THE COURT: For either of those two?

MS. NORTHUP: That's correct.

THE COURT: So we just have him to

worry about. The government has to make arrangements with a marshal. Do you think this witness will go over the lunch hour?

MR. EDELBAUM: I have no idea. I am not going to be that long with him. It depends upon how long the government is.

(Discussion off the record)

(Continued on next page)

THE COURT: Mr. Heine, we have a little problem here. One of the witnesses, he is presently sitting on the witness stand, called by the defense in this case, there is an arrest warrant that the government has for him. I don't want him to be aware of the arrest warrant or any arrest take place before he has completed his testimony so as not to deprive the defendants of the benefit of his testimony.

So what we have asked if it is at

all feasible, when he finishes his testimony he will leave the courtroom, and if you could execute the arrest warrant outside of the courtroom as soon as he leaves. Does that present a problem for your?

THE MARSHAL: Not that I know of, your Honor, only that Agent Serniak had mentioned there was an arrest warrant for him. I understand it is a DEA warrant for him? I don't know, is he a fugitive with the marshal service?

MS. NORTHUP: No, it is an arrest based on the DEA but it is to the United States Marshal or any other authorized officer.

THE MARSHAL: Okay. I wold just ask that we have a DEA agent with us.

THE COURT: All right.

MS. NORTHUP: Sure.

THE COURT: So tell him, when Mr. --

what's his name?

MS. NORTHUP: Mr. Mock.

THE COURT: Yes, when he leaves the courtroom for the agent to be outside with the marshal.

Anything else you need in order to do that?

THE MARSHAL: No, your Honor.

THE COURT: I just don't want the jury to be aware that he is being arrested. I don't want him to be aware there is an arrest warrant for him until his testimony is over. And we might go over the one o'clock recess time so we can complete his testimony.

MR. EDELBAUM: The only problem, Judge, that I can foresee happening is when we excuse -- if your Honor excuses the jury before excusing the witness they could be walking around back when he is walking around back and they can see his

arrest. So I would ask that the witness be excused before the jury is excused.

THE COURT: All right.

MR. EDELBAUM: So they don't see him being arrested.

THE COURT: Okay. Fair enough.

APPENDIX B

DECISION OF DISTRICT COURT REGARDING MOTION TO SUPPRESS PETITIONER'S PRIOR TESTIMONY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

-against- OPINION AND ORDER

JORGE GARCIA, S2 90 Cr. 890 (PKL)
a/k/a "Toton,"
WASANG TOMAS MOCK,
a/k/a "Chino," and
RAUL RODRIGUEZ,
a/k/a "Raulin,"
a/k/a "El Morenito,"

Defendants.
----------x

APPEARANCES

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Attorney for Defendant Wasang Tomas Mock

LEISURE, District Judge,

In this criminal case, the defendants, Jorge Garcia ("Garcia"), Raul Rodriguez ("Rodriguez") and Wasang Tomas Mock ("Mock"), are charged in the second superseding indictment ("indictment") with conspiracy to distribute, possession of narcotics and use of a gun in relation to drug trafficking. Defendant Mock now moves the Court for relief concerning statements he made on July 30, 1991, at the first trial of this action, before the Hon. Mary Johnson Lowe, United States District Judge of this Court. Defendants

Garcia and Rodriguez also move the Court, seeking a finding that double jeopardy bars their retrial and dismissal of their indictment in the exercise of the court's supervisory powers. In addition, all of the defendants move the Court to sever the perjury counts against Mock from the trial of the other offenses. For the following reasons, the defendants' various motions are denied in their entirety.[1]

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[1]Oral argument on these motions was heard by this Judge on December 4 & 5, 1991. The Court also held an evidentiary hearing on December 4 with respect to Mock's motion to suppress evidence seized during a search of his apartment on July 30, 1991. Although defendant's wife, Lillian Mock, testified credibly in part at the hearing, the Court held that the totality of the circumstances indicated that Mrs. Mock had consented to the search of the apartment, and Mock's suppression motion was denied. For the reasons stated at the hearing, the Court also denied defendants' motion for further discovery and for a bill of particulars. Further, the Court postponed for

BACKGROUND

The first indictment in this case was filed on December 18, 1990, and charged Garcia, Rodriguez and Pedro Henriquez Valdez ("Valdez") with conspiracy to possess with intent to distribute over 50 grams of crack, possession of over 50 grams of crack and over 500 grams of cocaine and the use of a firearm in relation to drug trafficking, in violation of 18 U.S.C. § 2 and 21 U.S.C. § § 812, 841 (a) (1), 841 (b) (1) (A) and 846. Valdez entered into a cooperation agreement, pleading guilty to the conspiracy and firearm counts on March 20, 1991, in return for his testimony against Garcia and Rodriguez.

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consideration during the trial whether evidence of Mock's prior conviction will be admissible under Fed. R. Evid. 404 (b), consistent with the teaching of United States v. Colon, 880 F.2d 650, 656-58 (2d Cir. 1989).

A superseding indictment was filed on April 25, 1991, and a trial against Garcia and Rodriguez began on July 23, 1991, before Judge Lowe ("First Trial"). The trial ended in a mistrial on August 2,1 991, when Judge Lowe discharged the jury, which was deadlocked 11-1 for acquittal, after two days of deliberations. The case was reassigned to this Judge on September 20, 1991.

During the first trial, on July 30, 1991, after the government rested, the defense called Mock as its first witness. At this time, the government approached the bench and asked for the jury to be excused, so that agents could execute an arrest warrant for Mock, which had been issued on May 24, 1991, relating to the same drug distribution conspiracy at issue in the first trial. The defense objected to execution of the warrant

before Mock testified, because "if they execute it now, you will be depriving the defendant of a defense." Trial Transcript ("Transcript"), at 354. Judge Lowe excused the jury, the government went to seek advice from the Appeals Unit of the U.S. Attorney's office and the discussion was adjourned to the robing room.

After discussions in the robing room, Judge Lowe arranged for a deputy U.S. marshal to be posted outside the courtroom so that Mock could be arrested after testifying. Accordingly, Mock testified and was cross-examined without the benefit of counsel and without being informed that he was going to be arrested. See Transcript, at 360 (statement of Judge Lowe) ("I don't want [Mock] to be aware of the arrest warrant or any arrest take place [sic] before he

has completed his testimony so as not to deprive the defendants of the benefit of his testimony. . . . [When] he finishes his testimony he will leave the courtroom, and if you could execute the arrest warrant outside of the courtroom as soon as he leaves.").

Nevertheless, Mock was clearly on notice that he had been implicated in the conspiracy at issue, and that his appearance in court posed the danger of arrest. In the robing room, counsel to Garcia and Rodriguez represented that they had told Mock and two other unindicted co-conspirators that "they might subject themselves to arrest if they come to court." Transcript, at 357. In fact, Richard Tannenbaum, Esq. ("Tannenbaum"), counsel, for Rodriguez, represented that he had told Mock "to get an attorney." Id. The following

questions by Philip R. Edelbaum, Esq. ("Edelbaum"), and responses from Mock at the trial lend further support to the conclusion that Mock was aware of his situation when he testified:

> Q. You know from reading the minutes that Mr. Valdez claimed that you were a partner in the drug business with Jorge Garcia?
>
> A. Yes, sir.
>
> Q. Did anybody tell you whether or not there was a chance you might be arrested if you came to testify in court?
>
> A. Well, there is always the chance because I was afraid of my permanent[sic] that I had back in 1984 because just he says something I could be in trouble, but I just wanted to clear my name."

Transcript, at 409-10.

DISCUSSION

I. Motions Relating to Mock Testimony at First Trial

The Court first turns to the considerations raised by Mock arising out of his testimony at the first trial.

Mock claims that his rights under the fifth, sixth and fourteenth amendments were violated by the manner in which his testimony was procured. He therefore seeks suppression of this testimony.

A. Suppression of Statements under Sixth Amendment

Mock begins by asserting that his testimony at the first trial violated his rights under the sixth amendment. He contends that adversary judicial proceedings against him had been initiated at the time he testified, by the filing of a complaint and the issuance of an arrest warrant. He therefore asserts that his right to counsel under the sixth amendment had attached, and that statements made by him without the assistance of counsel must be suppressed. In response, the government argues that adversary judicial

proceedings had not commenced at the time of the first trial, and that no sixth amendment rights had attached.

Under Kirby v. Illinois, 406 U.S. 682, 689 (1972), the sixth amendment right to counsel attaches "after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information or arraignment." See United States v. Yu-Leung, 910 F.2d 33, 39 (2d Cir. 1990) (citing examples of "critical stages" marking initiation of adversary proceedings). Further, the Second Circuit has found that the filing of a complaint and issuance of an arrest warrant do not constitute adversary judicial proceedings for the purpose of the sixth amendment. See United States v. Smith, 778 F.2d 925, 932 (2d Cir. 1985) ("sixth amendment right to counsel

does not arise at the time of arrest upon a warrant following the filing of a complaint"); United States v. Duvall, 537 F.2d 15, 22 (2d Cir.) (Friendly, J.) ("We see no reason in principle why the filing of a complaint should be deemed to give rise to a right to counsel immediately upon arrest pursuant to warrant."), cert. denied, 426 U.S. 950 (1976).

It is thus clearly established in the Second Circuit that Mock was not subject to adversary judicial proceedings as a result of the filing of a complaint and issuance of a warrant. Mock also had not been indicted or arraigned, which would have signaled the initiation of adversary judicial proceedings against him. Since no sixth amendment right had attached when Mock testified at trial. there was no violation of his sixth amendment right in testifying at the

first trial without the assistance of counsel. Mock's sixth amendment motion is therefore denied.[2]

B. Suppression under Fifth Amendment

Defendant next contends that his testimony at the first trial violated his fifth amendment rights because he was not given Miranda warnings before testifying and because his statements were not voluntarily made. The government responds that Mock was not subject to custodial interrogation at the first

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[2] Mock's sixth amendment motion is apparently joined with a motion under the fourteenth amendment. However, Maine v. Moulton, 474 U.S. 159, 168 (1985), which Mock cites, relied on the fourteenth amendment because the Court was considering the sixth amendment right to counsel as it applied to the actions of the state of Maine. See Powell v. Alabama, 287 U.S. 45, 67-68 (1932). The fourteenth amendment due process clause is simply not implicated in the instant case.

trial, and that he testified voluntarily.

1. Right to Warnings under Miranda

To raise a violation of one's rights under the fifth amendment, a party must have been compelled to testify after affirmatively raising a "valid claim of the privilege." Minnesota v. Murphy, 465 U.S. 420, 427-28 (1984) ("the Court need ask only whether the particular disclosure was 'compelled' within the meaning of the Fifth Amendment"). However, under Miranda v. Arizona, 384 U.S. 436, 479 (1966), a party subject to "custodial interrogation" must be warned of his constitutional rights before being questioned. Custodial interrogation and the accompanying protection of Miranda are implicated when "a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440

(1984) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)).

In Alexander v. Connecticut, 917 F.2d 747, 751 (2d Cir. 1990), cert. denied, 111 S. Ct. 2831 (1991), the Second Circuit described custodial interrogation as follows: "Miranda 'custodial interrogation' involves two elements. The suspect must be in police custody, and he must be aware that he is being interrogated by government authorities or their representatives." The inquiry into "the custodial quality of an interrogation for Miranda purposes . . . focuses on whether a reasonable person in the same circumstances would have believed that he was not free to leave." United States v. Kirsteins, 906 F.2d 919, 923 (2d Cir. 1990); see Illinois v. Perkins, 110 S. Ct. 2394, 2397 (1990) ("Coercion is determined from

the perspective of the suspect."): Berkemer, supra, 468 U.S. at 442 ("the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation").

In the case at bar, it is clear that Mock's Miranda rights were not implicated, because he was not subject to custodial interrogation. Judge Lowe was careful to insure that Mock was not in police custody when he testified at the first trial. Further, since Mock claims that he was misled by the Court as to his status, see Memorandum of Law of Defendant Wasang Mock ("Mock Motion"), at 17, Mock must have been unaware that he was going to be arrested after testifying. The Court therefore finds that a reasonable person in Mock's situation, who came to court to "clear [his] name," and did not believe that he

was going to be arrested, would not have believed himself in custody and subject to those pressures to which Miranda and its progeny are responsive. Mock therefore had no right to Miranda warnings.

2. Voluntariness of Mock Testimony

Statements which are made voluntarily are not barred by the fifth amendment. Thus, a confession will be admissible over fifth amendment objection if the government proves by a preponderance of the evidence that it was given voluntarily. See United States v. Diaz, 891 F.2d 1057 (2d Cir. 1989). Voluntariness is "determined after a careful evaluation of the totality of all the surrounding circumstances, including the accused's characteristics, the conditions of interrogation, and the conduct of law enforcement officials."

United States v. Anderson, 929 F.2d 96, 99 (2d Cir., 1991); see Campaneria v. Reid, 891 F.2d 1014 (2d Cir. 1989), cert denied, 488 U.S. 945 (1988); United States v. Okwumabua, 828 F.2d 950 (2d Cir. 1987), cert. denied, 484 U.S. 1063 (1988). Voluntariness "cannot be taken literally to mean a 'knowing' choice." Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973). Rather, a voluntary statement is "'the product of an essentially free and unconstrained choice by its maker . . . . where his will has [not] been overborne and his capacity for self-determination [not] critically impaired.'" Id. at 225 (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

Examining the totality of the circumstances, the Court finds that Mock's statements were made voluntarily,

precluding suppression for violation of his fifth amendment rights. Mock is a high school graduate and a former partner in a business. He is 32 years old, and is no stranger to the Federal criminal justice system, having already been tried once and convicted Mock was not brought into Judge Lowe's courtroom by force or by use of process. Rather, he appeared to testify to "clear my name," despite being warned that there would be DEA agents at the trial and that he had been implicated in the drug conspiracy then on trial.

Mock's contention that he did not testify voluntarily focuses primarily on the government's and Court's failure to inform him that he would be arrested after leaving the courtroom. However, a finding of voluntariness does not require a finding that the defendant acted with

full knowledge of the consequences of his actions. See Schneckloth, supra, 412 U.S. at 224; see also Oregon v. Elstad, 470 U.S. 298, 316-317 (1985) ("a defendant's ignorance of the full consequences of his decisions [does not] vitiate their voluntariness"). Further, this is not a case like United States v. Goldstein, 611 F. Supp. 626, 632, N.D. Ill. 1985), where the government deliberately misled the defendant as to his status. Mock knew he was a suspect in this case. Nevertheless, he voluntarily decided to appear in Court to testify, and the failure to explicitly inform him of the consequences of his actions is not dispositive. Because Mock was not in custody and because he testified voluntarily, his fifth amendment motion is denied.

C. Suppression for Violation of Mock's Constitutional Rights

Relying on United States v. Colyer, 571 f.2D 941 (5th Cir.), cert. denied, 439 U.S. 933 (1978), and United States v. Silverstein, 732 F.2d 1338 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985), Mock makes another motion to suppress, claiming that "Judge Lowe. . . failed to protect the Constitutional Rights of Mr. Mock as a witness." Mock Motion, at 19. However, in Colyer the Fifth Circuit found that the trial court had improperly invoked the privilege on behalf of a witness who was willing to answer the question of whether he was homosexual. Although Colyer found that a court can warn a witness that he may be entering an area that raises fifth amendment concerns, the case imposed no obligation on the Court to warn a witness

that his fifth amendment rights are implicated. See also Silverstein, supra, 732 F.2d at 1345. This Court has already decided that Mock's fifth and sixth amendment rights were not violated by his testimony at the first trial, and the cases Mock cites do not change this conclusion. The motion to suppress based on the purported violation of Mock's "Constitutional Rights" is denied.

II. Motions Relating to Perjury Counts against Mock

Counts Five and Six of the Indictment charge Mock with perjuring himself during his testimony at the first trial. Count Five concerns Mock's testimony that he was not a drug dealer, that since 1990 he had not been involved with or in the presence of cocaine and that he had never been to apartment 24 at 615 West 143rd Street. See Transcript,

at 368, 387-88. Count Six charges that Mock committed perjury by denying that he knows Garcia by the name of "Toton." See Transcript, at 396. The Court first considers Mock's assertion that the perjury counts are insufficient as a matter of law. Next, the Court addresses Mock's motion to sever the perjury counts from his trial on the substantive issues. The Court then turns to consider the motion by Rodriguez and Garcia to sever the trial of Mock's perjury counts from their trial on the possession, conspiracy and firearm counts.

Before proceeding, and by way of introduction to the perjury issue, the Court notes that the attitude of the Courts to the crime of perjury is extremely negative. "Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings.

Effective restraints against this type of egregious offense are therefore imperative." United States v. Mandujano, 425 U.S. 564, 576 (1976) (Burger, C.J.); see also United States v. Wong, 431 U.S. 174, 178 (1977); United States v. Washington, 431 U.S. 181, 189 (1977). Perjury by a witness demonstrates a cynical and contemptuous attitude towards his obligations and duties in court proceedings, having previously sworn to a solemn oath to tell the truth.[3] False testimony at trial undermines the very foundation of our justice system, generating unnecessary confusion for juries and leading to unfortunate results

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[3] "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." Fed. R. Evid. 603.

in some cases. Indeed, under the sentencing guidelines, false trial testimony by a defendant in a criminal case is an appropriate basis for imposing an obstruction of justice upgrade at the time of sentencing by the Court. See e.g., United States v. Bonds, 933 F.2d 152, 155 (2d Cir. 1991) (per curiam).

A. Sufficiency of Perjury Counts

Mock's first motion with respect to the perjury counts relies on his argument that these charges are insufficient as a matter of law. Mock asserts that Count Five does not involve his responses to questions about specific factual issues, but instead charges him with perjury for statements analogous to a plea of not guilty. Mock then contends that the statements upon which Count Six focuses are not material to the ultimate issue at trial.

Mock begins by drawing the Court's attention to United States v. Endo, 635 F.2d 321, 323 (4th Cir. 1980). Endo was a case where a defendant was charged with perjury after she changed her plea from guilty to not guilty. However, the Fourth Circuit rejected the perjury charge, holding that a charge of perjury must be based on "'a fact or facts' and '[t]he statement must be such that the truth or falsity of it is susceptible of proof.'" Endo, 635 F.2d at 323 (quoting Kolaski v. United States, 362 F.2d 847, 848 (5th Cir. 1966)).

Mock argues that Endo requires dismissal of the perjury charges relating to his statements concerning drug dealing, cocaine and the apartment, because the statements were akin to a not guilty plea. However, Mock answered "No" to the following questions:

"Were you a drug dealer?"

"Since . . . 1990, have you had any involvement with cocaine since that time?"

"Never negotiating deals for cocaine?"

"Now, have you ever been to apartment 24 at 615 West 143rd Street?"

Transcript, at 368, 387-88. The plain language of these questions and responses clearly demonstrates that they do not involve legal conclusions, such as not guilty; they are specific answers to factual questions. The motion to quash Count Five is denied.

Turning to Count Six, the Court notes that Mock's motion to dismiss this Count cites no legal authority; it is based on the bald proposition that "whether [Mock] knew defendant Garcia by 'Toton' or whether he knew anyone else by the name of Toton was not relevant to the ultimate issue." The materiality of

perjured testimony is a threshold issue for determination by the Court; further materiality must be broadly construed. See United States v. Berardi, 629 F.2d 723, 728 (2d Cir.), cert. denied, 449 U.S. 995 (1980). According to United States v. Gugliaro, 501 F.2d 68, 71-72 (2d Cir. 1974), "[t]he test of materiality in a perjury case is whether or not the false testimony was capable of influencing the jury on the issue before it. . . The misstatement of fact need not be 'dispositive' of the inquiry in question to be material."

It is obvious to the Court that the issue whether Mock knew Garcia by the name "Toton" could have influenced the jury. At the first trial, the government introduced drug records containing the name "Toton". Further, Mock was one of four defense witnesses claiming not to

know Garcia by this name. It is clear that contrary testimony from Mock could have influenced the jury, which ultimately deadlocked 11-1 for acquittal. Mock's motion to dismiss Count Six is therefore denied.

B. Mock Motion to Sever Perjury Counts

Mock next moves under Fed. R. Crim. P. 14 to sever the perjury counts from the trial on the substantive offenses "so that the defendant is not prejudiced by an inference that may be drawn by the jury with regard to the Government's view of the defendant [sic] prior denial of guilt." Mock Motion, at 31. In the face of the Second Circuit's clear precedents, the motion must be denied.

"The law in this circuit clearly supports the joinder of underlying substantive crimes with perjury counts

where, as here, the false declarations concern the substantive offenses. . . . The contention that there is some inherent prejudice in joining perjury and related counts with substantive offense charges has been widely rejected." United States v. Potamitis, 739 F.2d 784, 791 (2d Cir.) (citations omitted), cert denied. 469 U.S. 934 (1984); see also United States v. Ruiz, 894 F.2d 501 (2d Cir. 1990) (affirming joinder of perjury and bank fraud counts). Further, as demonstrated by the cases cited in Potamitis, supra, 739 F.2d at 791, this precedent is well-established, and reflects a balancing of the interests of trial efficiency with the interests of the individual defendant. See generally United States v. Werner, 620 F.2d 922, 928-29 (2d Cir. 1980) (Friendly, J.). To cure any possible prejudice that does

exist, the Court can instruct the jury to consider the counts separately. However, in light of the caselaw, Mock's severance motion must be denied.

C. Severance Motions of Garcia and Rodriguez

Garcia and Rodriguez also move for severance of their trial from Mock's trial on the perjury charge, either by severing Mock as a defendant, or by severing Mock's perjury counts from the other charges against him. Garcia and Mock rely on the assertion that joint trial would be "highly prejudicial to the defendants and would prevent them from obtaining a fair trial. It is apparent that the government, who came so close to losing in the first trial, wants to insure a conviction here, even if it means poisoning the jury by saying that Mr. Mock lied at the first trial in order

to help them." Memorandum of Law in Support of Defendant Garcia's Omnibus Motion ("Garcia Motion"), at 7.[4]

There is an extremely heavy burden on a defendant who is moving for severance under Fed. R. Crim. P. 14. The defendant seeking severance "must show prejudice so severe as to amount to a denial of a constitutionally fair trial." United States v. Serpoosh, 919 F.2d 835, 837 (2d Cir. 1990) citing United States v. Cunningham, 723 F.2d 217, 230 (2d Cir. 1983), cert denied, 466 U.S. 951 (1984)). One example of such a situation is where defendants offer antagonistic defenses such that the jury would have to convict one of the two defendants, or where the jury would infer that both defendants are guilty because of the conflict in their

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[4] Defendant Rodriguez, on the consent of all parties, joins in the motions made by defendant Garcia.

testimony. See Grant v. Hoke, 921 F.2d 28 (2d Cir. 1990); Serpoosh, supra, 919 F.2d at 837-38; United States v. Villegas, 899 F.2d 1324 (2d Cir.), cert denied, 111 S. Ct. 535 (1990).

To prevail on a severance motion, defendant must make a "showing that he [will] suffer[] 'prejudice so substantial as to amount to a miscarriage of justice.'" United States v. Uccio, 917 F.2d 80, 88 (2d Cir. 1990) (quoting United States v. Friedman, 854 F.2d 535, 563 (2d Cir. 1988), cert denied, 490 U.S. 1004 (1989)). That separate trials would yield a better chance for acquittal is not sufficient to justify severance. United States v. Scarpa, 913 F.2d 993, 1015 (2d Cir. 1990). "'[D]iffering levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds

for separate trials.'" United States v. Chang An-Lo, 851 F.2d 547, 557 (2d Cir.) (quoting United States v. Carson, 702 F.2d 351, 366-67 (2d Cir.), cert denied, 462 U.S. 1108 (1983)), cert denied, 488 U.S. 966 (1988). "It is an 'established rule' that 'a nonfrivolous conspiracy charge is sufficient to support joinder or defendants under Fed. R. Crim. P.8 (b).'" Uccio, 917 F.2d at 87 (quoting United States v. Nerlinger, 862 F.2d 967, 973 (2d Cir. 1988)). Further, when evidence is admissible against all of the defendants, severance is not required. See Uccio, supra, 917 F.2d at 88; Scarpa, supra, 913 F.2d at 1015; Villegas, supra, 899 F.2d at 1347.

In the instant case, Garcia and Rodriguez have failed to show that joinder of their trial with Mock's perjury counts will so prejudice them.

that they will be denied a fair trial. The government has demonstrated that the evidence that will be used against Mock to prove the perjury count will also be admissible against Garcia and Rodriguez under Fed. R. Evid. 804 (b) (1) and 801 (d) (2) (e). Further, the government argues that both Mock's perjury, and Garcia's and Rodriguez' attempts to suborn this perjury, will be admissible to show consciousness of guilt. See e.g., United States v. Roldan-Zapata, 916 F.2d 795, 803-04 (2d Cir. 1990), cert.denied, 111 S. Ct. 1397 (1991). Even if the evidence is not admissible as against Garcia and Rodriguez, these defendants have failed to carry the extremely heavy burden of showing that denial of the severance motion will preclude a fair trial. The severance motion of Garcia and Rodriguez is

therefore denied.

III. Motions of Garcia and Rodriguez to Dismiss their Indictments

Garcia and Rodriguez next move the Court to dismiss the second superseding indictment against them on double jeopardy grounds. They also move to have the Court dismiss the indictment in the exercise of its supervisory power.

A. Double Jeopardy Motion

Defendants' double jeopardy motion relies and the assertion that the government was responsible for the mistrial at the first trial because it did not turn over evidence that was discoverable under Brady v. Maryland, 373 U.S. 83 (1963), and Fed. R. Crim. P. 3500, until after the mistrial was declared. The evidence that allegedly was withheld consisted of items seized from Valdez when he was arrested on

December 18 and tapes of conversations between Mock and Valdez.

1. Evidence Allegedly Withheld at the First Trial

The Court begins by examining the evidence that allegedly was withheld by the government in violation of Brady and Rule 3500. Garcia and Rodriguez contend that the government did not disclose "numerous receipt [sic] for cash wire transfers to different individuals in the Dominican Republic" seized from Valdez upon his arrest. Affidavit of Philip R. Edelbaum, Esq., Sworn to on Oct. 25, 1991 ("Edelbaum Aff.") Par. 17. Defendants claim that the information should have been turned over because it concerned Valdez' true occupation and source of income, and would have been useful on cross-examination to show that the drug distribution operation belonged to

Valdez. In contrast, the government asserts that this information was made available for defendants' attorneys to inspect when they visited the United States Attorneys Office. See Affirmation of Nancy Northup, Esq. ("Northup"), sworn to on November 22, 1991 ("Northup Aff.") Par. Par. 7-8; Exh. D, at 2 (May 31, 1991 letter informing counsel of availability of evidence seized from defendants and Mr. Valdez).

At the hearing on December 4, 1991, both AUSA Northup and attorney Edelbaum proffered to the Court their respective recollections of the meeting during which the government's evidence was disclosed to the defendants. Northup also responded to extensive inquires by the Court concerning her recollection of the manner in which Valdez' personal belongings were stored by the United

States Attorney's Office. Northup specifically recalled the presence of the receipts within the single envelope containing all of Valdez' personal property; she also testified that she had no reason to believe that the receipts had ever been separated from the other evidence in the file. In contrast, Edelbaum stated that he did not recall seeing the evidence in the envelope, and that if the evidence had been present, he would have seen it. Having fully explored this matter during the proffer, and having listened to and observed both attorneys, the Court finds that the evidence was disclosed by the government in the first instance.

The defendants also claim that they were prejudiced by the government's admitted failure to disclose tapes of certain conversations between Mock and

Valdez. Defendants assert that the taped conversations would have been effective impeachment material. In contrast, the government claims that this evidence was not effective impeachment material, relying on the well-established precedent that there was no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985).

2. Standard Governing Double Jeopardy Bar

The Court next turns to the law governing the double jeopardy bar. It is axiomatic that "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." Richardson v. United States, 468 U.S. 317, 324 (1984); United States v. Perez, 22 U.S. (9 Wheat.) 579

(1824); United States v. Ustica, 847 F.2d 42, 48 (2d Cir. 1988) ("where a mistrial is declared because of the failure of a jury to reach a verdict, there is no double jeopardy bar to retrial of the defendant").

It has been argued that no double jeopardy bar arises if a mistrial is declared on the motion of the defendant, or on the defendant's consent. However, even when a mistrial results from the defendant's own motion, double jeopardy precludes retrial if there "was intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. . . . Only where the governmental conduct in question is intended to 'goad' the defendant into moving for mistrial may a defendant raise the bar of double jeopardy to a second trial." Oregon v. Kennedy, 456 U.S. 667,

675-76 (1982); see United States v. GAF Corp., 884 F.2d 670 (2d Cir. 1989) (double jeopardy bar arises upon showing of prosecutorial intent to cause mistrial); United States v. Rivera, 802 F.2d 593, 597 (2d Cir. 1986) (double jeopardy bars retrial after defense mistrial motion only upon "governmental misconduct so egregious that [defendant] must abandon his right to take his case to the first trier of the facts").

As this legal standard demonstrates, the double jeopardy inquiry focuses on whether the government intended to cause the mistrial by withholding the evidence. However, defendants have not argued, and have failed to produce even a scintilla of evidence to support a claim, that the government intended to cause a mistrial by withholding evidence. At most, defendants assert that they "were

prejudiced in not having the material" and that "the government was directly responsible for the mistrial." Garcia Motion, at 4.

Defendant's claim that an acquittal would have resulted from more effective cross-examination based on the non-disclosed tape recordings is entirely speculative. See, e.g., United States v. Wright, 622 F.2d 792, 795 (5th Cir.) ("Any link between bad faith prosecutorial misconduct during the trial, if it existed, and the jury's inability to reach a verdict is too attenuated to be more than mere speculation."), cert. denied, 449 U.S. 961 (1980). Further, this type of speculation cannot serve as the basis for precluding a retrial of these defendants under the double jeopardy bar. The remedy for a violation of Brady and Rule

3500 is a new trial -- not the double jeopardy bar. See, e.g., Giglio v. United States, 405 U.S. 150, 153 (1972) ("suppression of material evidence justifies a new trial.'") (Quoting Brady, supra, 373 U.S. at 87).[5] In fact, Garcia and Rodriguez already have this remedy, with a new trial scheduled to begin on January 6, 1992. Defendants' allegation that the government caused the mistrial does not show that it intended to cause the mistrial, and the double jeopardy motion therefore must be denied.

B. Dismissal of Indictment under Court's Supervisory Power

Garcia and Rodriguez next move the Court to dismiss the indictment in the

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[5] The Court takes this opportunity to reject defendants' assertion that Giglio requires the government to separate and categorize the evidence it discloses for the purpose of notifying the defendant of its potential impeachment value.

exercise of its supervisory power. However, the cases defendants cite do not demonstrate that the relief they seek is within this power. In the exercise of its supervisory power, a Court can dismiss an indictment "to prevent prosecutorial impairment of the grand jury's independent role." United States v. Hogan, 712 F.2d 757, 761 (2d Cir. 1983); see also United States v. Vetere, 663 F. Supp. 381, 382 (S.D.N.Y. 1987) (dismissing indictment for prosecutorial misconduct before grand jury, with leave to file new indictment). A Court can also use its supervisory power to reverse a conviction for prosecutorial misconduct. See United States v. Hasting, 461 U.S. 499, 505-07 (1983).

However, none of this precedent supports dismissal of an indictment for the purported failure to turn over

evidence that allegedly was within Brady and Rule 3500. It is clear that dismissal of an indictment "is an 'extraordinary' remedy." United States v. Casamento, 887 F.2d 1141, 1182 (2d Cir. 1989) (quoting United States v. Thibadeau, 671 F.2d 75, 77 (2d Cir. 1982)), cert. denied, 493 U.S. 1081 (1990); see also, United States v. Fields, 592 F.2d 638 (2d Cir. 1978) (dismissal of indictment is "most drastic remedy"), cert. denied, 442 U.S. 917 (1979); cf. Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988) (supervisory power to dismiss indictment for prosecutorial misconduct before grand jury does not supplant harmless error analysis). Defendants have cited neither facts nor precedent demonstrating that dismissal of the indictment is a proper remedy in the circumstances of this case.

Defendant's motion is therefore denied.

CONCLUSION

For the foregoing reasons, Mock's motions to suppress evidence seized from his home and to suppress testimony given at the first trial are denied. The Court also denies Mock's motions to dismiss the perjury counts against him, and the defendants' various motions to sever the perjury counts from the trial on the other charges. The motions of defendants Garcia and Rodriguez to dismiss the indictment against them is denied. Defendants' motion for supplemental discovery and for a bill of particulars is also denied. Finally, Mock's in limine motion to exclude evidence of his prior conviction is deferred until trial.

SO ORDERED
Dated: December 16, 1991
New York, New York

PETER K. LEISURE
U.S. D. J.

APPENDIX C

DECISION OF DISTRICT COURT INVOLVING EXCLUSION OF DEFENSE EVIDENCE REGARDING CIRCUMSTANCES OF PETITIONER'S PRIOR TESTIMONY.

MR. GREENBERG: I am certainly aware of the concern of Mr. Edelbaum and Mr. Tannenbaum, but depending on your Honor's ruling, if the whole testimony goes in, I have the right to argue to this jury the voluntariness of my client's statement to bring out all such circumstances in front of the jury, including Judge Lowe's statement that he should testify without being told there is a warrant there. I have a right to argue that under the statute. I have a right to bring up voluntariness under 3501 to the jury, your Honor.

THE COURT: I will hear from the government. Let's take these things step by step. It's important to cover this

even though it may be out of sequence as far as the government's presentation.

MR. GREENBERG: I bring it up in sequence only to relate it that it may become important for the lawyers' names for the purpose as far as voluntariness.

THE COURT: I understand why you are bringing it up, Mr. Greenberg. You don't have to explain it. I am just saying it's out of sequence as far as how the government was going to present its argument. We will take it in the sequence in which it's being offered.

Let me hear from the government with respect to that.

MS. NORTHUP: I don't think it's appropriate that voluntariness be argued to the jury. 3501 refers to the admissibility of confessions. Mock's prior statement is not a confession, it's an exculpatory statement made by a

witness voluntarily under oath and I don't think it's appropriate to use an analysis to determine the voluntariness of the confession. It's not the case where a jury can decide that the police used some kind of duress or something against the witness. I don't think that is appropriate. I think referring to Mr. Garcia's counsel and Mr. Rodriguez's counsel, in any event, will not go to that issue.

THE COURT: It's fortunate that Judge Lowe handled it as well as she did, in my opinion. It kept me from having some problems in the retrial. So I agree with what you just said. But I will hear further from Mr. Greenberg.

MR. GREENBERG: 3501, a confession means also any self-incriminating statement. In the government's own letter they are offering it because it's

self incriminating. It's an admission. That is the basis of their own argument in front of this court. So now how they can say that it's not is a little inconsistent.

THE COURT: Let me hear from any other counsel that either supports his position or oppose his position for any reason so I am sure I have heard all argument.

Does anyone else have anything to add with respect to this discrete point being raised?

MR. GREENBERG: Voluntariness does not only depend upon what the government agents did. It could be other persons involved, whether a confession is made or a statement is truly voluntary.

THE COURT: What does the government say?

MS. NORTHUP: Our position is the same that this is not a confession in which it's appropriate to bring to the jury all aspects of voluntariness. It's a witness' statement under oath. It's not incriminatory on its face. Yes, we are offering it for proof both of the conspiracy and for proof that there were false exculpatories, but it's not a confession in the sense of saying I dealt kilograms of cocaine for 4 years. I think it would confuse the issues for the jury to be bringing in Judge Lowe's ruling that he not be told there was an arrest warrant. I don't see how it's relevant to determining the facts before us as to the perjury count or to the substantive conspiracy and narcotics counts. So I don't believe that it's appropriate that those issues be brought out before the jury here.

THE COURT: You know, I don't think judges stress enough in these criminal cases, when issues like this come, up the importance of reading Rule 102, 403 and 611 (a) together, and the fact that the government is arguing possible confusion of the jury which will outweigh the probative value of what Mr. Greenberg hopes to bring forward by creating a collateral issue and then developing it and then having the government have to respond in order to neutralize the consideration. We get off into a collateral matter which can confuse the jury, so it's very important to be considering Rule 403 and Rule 611 (a). But we come back to that basic language of Rule 102 of trying to use the trial for a purpose of obtaining fairness for both sides "to the end that the truth may be ascertained and proceedings justly

determined." That is the reason I emphasize Rule 102.

I feel that is an overbearing concern in the trial of these cases and it's the one reason that I occasionally ask questions myself merely for purposes of clarification which has been objected to by Mr. Greenberg, but I did point out to him that there is case authority showing that as long as the judge doesn't try to take over the trial for either side, and if the judge is seeking to establish clarification with respect to testimony, the judge should be involved in questioning. As one court said, the judge is not a "bump on a log" throughout the trial. That was first said in United States against Pisani, 773 F.2d 397, 403 (Second Circuit 1985), and it has been used in other decisions by the Second Circuit to make that point, including

United States against Bejasa more recently in 1990, and I did mention earlier about the judge having a greater role and not simply being a tennis linesman, calling the ball either in or out. Now, that is during the trial. It's when it's in front of the jury and it is from clarification that I have tried to ask questions from time to time.

I just wanted to go back to that original objection by counsel to again indicate there are a great many cases which support the judge being alert and looking for fulfilling his role to see that Rule 102 is carried out during the trial.

Now we come back again to this consideration and as far as I am concerned my ruling is that it has no place in this trial to be getting into a warrant for the arrest of Mr. Mock which

Judge Lowe very sensibly decided should await the completion of his testimony before he was aware of that.

MR. GREENBERG: That is already in evidence, your Honor.

THE COURT: I am just saying I am not going to let you weigh down this trial with further considerations of these matters and I reject your arguments and I rule that you cannot do it.

APPENDIX D

ORDER AND DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DATED FEBRUARY 17, 1994

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of February, one thousand nine hundred and ninety-four.

PRESENT: HON. WILFRED FEINBERG
HON. RICHARD J. CARDAMONE
HON. FRANK X. ALTIMARI

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

-v-

92-1742
PEDRO H. VALDEZ, 92-1744
93-1015

Defendant.

WASANG TOMAS MOCK, JORGE GARCIA,
and RAUL RODRIGUEZ,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgement of said district court be and it hereby is affirmed in accordance with the opinion of this court.

GEORGE LANGE III, Clerk

By:

Edward J. Guardaro
Staff Attorney

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 102, 103, 104—August Term, 1993

(Argued: September 2, 1993 Decided: February 17, 1994)

Docket Nos. 92-1742, 92-1744, 93-1015

UNITED STATES OF AMERICA,

Appellee,

—v.—

PEDRO H. VALDEZ,

Defendant,

WASANG TOMAS MOCK, JORGE GARCIA,
and RAUL RODRIGUEZ,

Defendants-Appellants.

Before:

FEINBERG, CARDAMONE, and ALTIMARI,

Circuit Judges.

Appeal from judgment of conviction entered by the United States District Court for the Southern District of

New York (Leisure, *J.*), following a jury trial, for various narcotics offenses in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), 841(b)(1)(B), and 846, weapons offenses in violation of 18 U.S.C. § 924(c), and, with respect to defendant appellant Wasang Tomas Mock, for perjury in violation of 18 U.S.C. § 1623.

Affirmed.

NANCY NORTHUP, Assistant United States Attorney, Southern District of New York, New York, N.Y. (Roger Hayes, United States Attorney, Southern District of New York, New York, N.Y., Nelson W. Cunningham, Assistant United States Attorney, Southern District of New York, New York, N.Y., of counsel), *for Appellee.*

TODD D. GREENBERG, Addabbo & Greenberg, Forest Hills, N.Y., *for Defendant-Appellant Wasang Tomas Mock.*

PHILIP R. EDELBAUM, New York, N.Y., *for Defendant-Appellant Jorge Garcia.*

BENJAMIN HEINRICH, Bronx, N.Y., *for Defendant-Appellant Raul Rodriguez.*

ALTIMARI, *Circuit Judge*:

Defendants-appellants Wasang Tomas Mock, Jorge Garcia, and Raul Rodriguez [collectively "the appellants"] appeal from judgments of conviction entered by

the United States District Court for the Southern District of New York (Leisure, *J.*), following a three-week jury trial. The appellants were convicted on a six-count indictment charging the appellants with participating in a large scale crack and cocaine distribution organization ("the organization"). They were also charged with weapons offenses, and Mock was charged with perjury based on testimony he gave at an earlier trial of his co-appellants. After their convictions, Mock and Garcia were principally sentenced by the district court to life imprisonment, and Rodriguez to 248 months' imprisonment.

Mock, Garcia, and Rodriguez now appeal their convictions and the sentences imposed on a variety of issues. Although most of these claims are completely without merit, and are not worthy of further discussion, there are several issues that require discussion. The most significant is Mock's contention that testimony he gave at an earlier trial of his co-appellants was involuntary, in that he testified without knowledge that the district court (Lowe, *J.*) had delayed the execution of an arrest warrant for him in order to ensure his testimony. Mock argues that his lack of knowledge about his impending arrest rendered his testimony involuntary and therefore inadmissible at his later trial. Additionally, Mock contends that the district court in the second trial erred when it admitted the testimony into evidence without allowing the admission of the circumstances under which it was given. Although we find both those contentions ultimately unpersuasive, we will discuss them in depth.

Additionally, appellants contend that the district court erred in charging the jury, and they challenge to the sentences imposed upon them. For the reasons stated below, we affirm the judgement of the district court as to all the issues on appeal.

BACKGROUND

Evidence accepted by the jury at trial demonstrated that, between 1986 and 1990, Mock, Garcia, Rodriguez, and others participated in a retail and wholesale crack and cocaine distribution organization located in Manhattan. Mock and Garcia were partners in running the organization, and Rodriguez performed various services for the organization.

There are two trials involved in this case. In the first, in July 1991 before Judge Lowe of the Southern District, Garcia and Rodriguez were tried for their involvement in the conspiracy. Mock had not yet been arrested, and he testified at that trial on behalf of Garcia. At the time of his testimony, he was not aware that there was a warrant out for his arrest, a warrant that was executed immediately following his testimony as per the instructions of Judge Lowe. Judge Lowe delayed the execution of the warrant until Mock testified out of concern that arresting Mock prior to his testimony would disadvantage the defendants. This first trial ended in a hung jury on August 2, 1991.

After the mistrial, a second indictment was filed on August 13, 1991 against all three appellants charging them with the following: conspiracy to possess with intent to distribute 50 grams and more of crack cocaine and five kilograms and more of cocaine, in violation of 21 U.S.C. § 846; possession with intent to distribute approximately 2.9 kilograms of crack cocaine and approximately 3.7 kilograms of cocaine, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 841(b)(1)(B), and in violation of 18 U.S.C. § 2; and using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. §§ 924 and 2.

The indictment also charged Mock with perjury, in violation of 18 U.S.C. § 1623, for his testimony at the first trial of his co-appellants.

The second trial began before Judge Leisure of the Southern District on January 6, 1992. At the second trial, the government substantiated to the jury's satisfaction the involvement of the appellants in the drug conspiracy. The government's witnesses at trial included an accomplice witness, Pedro Valdez, who began working for the organization in January 1990 and cooperated with the government after an unrelated arrest. The government also presented the testimony of Nelson Almonte, a Drug Enforcement Agency ("DEA") confidential informant, who attested to his involvement in a purchase of crack from the organization. Other witnesses, including experts, also testified on behalf of the government. Physical evidence introduced included extensive drug paraphernalia, lease and rent payment records, wire transfer records, a rolodex seized from Mock's home, and tape recordings of conversations between Almonte and Mock after the appellants had been arrested.

The second trial ended on January 24, 1992, when the jury returned a verdict of guilty against the appellants on all counts. On July 23, 1992, the district court sentenced both Mock and Garcia to life imprisonment, plus a mandatory five-year consecutive sentence on the weapons count and special assessments. On December 8, 1992, the district court denied Garcia's and Mock's motion for a new trial pursuant to Fed. R. Crim. P. 33, based on newly discovered evidence. On January 5, 1993, the district court sentenced Rodriguez to 248 months' imprisonment, including a mandatory five-year sentence on the weapons count, a five-year term of supervised release, and a special assessment.

The appellants have appealed their convictions and sentences on a variety of grounds. Most of these grounds do not merit any discussion, because the legal standards for their resolution are well-established and unchallenged. A few of the issues, however, present novel questions for our consideration, and will be discussed at length. The background involving those claims will be recounted as necessary in the appropriate Discussion sections.

DISCUSSION

I. *Mock's Testimony at the First Trial*

Mock argues that the district court erred in allowing the government to introduce his testimony from the earlier trial of his co-appellants.

A. *Background*

As noted above, appellants Garcia and Rodriguez were tried in July 1991 before Judge Lowe in the Southern District. Mock at that time was not a co-defendant, and had not yet been arrested in connection with this case. On July 30, 1991, Garcia called Mock as his first witness. At sidebar, the government informed Judge Lowe that there was a warrant for Mock's arrest. The court denied the government's request to execute the warrant immediately, mainly because executing the warrant would deprive the defendants of the benefit of Mock's testimony. The judge then excused the jury, and adjourned with counsel to the robing room.

In the robing room, the district judge indicated that if the warrant was executed prior to Mock's testimony, "the defendants would have a legitimate claim that the gov-

ernment prevented this man's testimony." The Assistant United States Attorney ("AUSA") representing the government agreed that there was a problem, and noted that Mock had rights that were implicated in the situation.

The record indicates that the AUSA then declared that although Mock and other possible witnesses for the defense were not at that time represented by an attorney, they had been told that "they might subject themselves to arrest if they come to court." Additionally, an attorney for the defense stated that the witnesses had been warned to hire an attorney. The government agreed to forestall Mock's arrest until Mock had testified, and Judge Lowe made arrangements to have Mock arrested out of sight of the defendants or the jury once he had testified.

Mock, who was not represented by counsel at the time, proceeded to testify on Garcia's behalf. He stated that he did odd jobs to support himself, denied being a drug dealer, had known Garcia for 20 years and had never known him to sell or use drugs, and had visited Garcia's apartment (which the government showed was the headquarters for the organization). Mock did testify that he was aware that there was "always a chance" of being arrested if he came to testify, but that he wanted to "clear his name." After Mock's testimony, he was arrested outside the courtroom.

At the second trial, Mock's testimony at the first trial was admitted into evidence to support the perjury charges and to show that he had been in the apartment in which the drug operation was organized. After a motion to suppress, Judge Leisure denied the motion and admitted the testimony:

> Mock is a high school graduate and a former partner in a business. He is 32 years old, and is no stranger

> to the Federal criminal justice system, having already been tried once and convicted. Mock was not brought in Judge Lowe's courtroom by force or by use of process. Rather, he appeared to testify to "clear my name," despite being warned that there would be DEA agents at the trial and that he had been implicated in the drug conspiracy then on trial.

Although the district court admitted the testimony, the court did not admit the underlying circumstances under which the testimony was given, finding that Mock's lack of knowledge as to the arrest warrant was not relevant evidence.

B. *Discussion*

Mock now argues that District Judge Leisure erred in admitting his prior testimony into evidence at the second trial, on the grounds that his statements in the first trial were not voluntarily made and that District Judge Lowe had an obligation to inform him of his imminent arrest. Mock tries to characterize his testimony in the first trial as a custodial confession, subject to Fifth Amendment restrictions on the use of confessions in criminal trials.

There are two issues implicated by the district court's choice to have Mock testify without being informed about his impending arrest. The first is whether Mock's testimony can be considered involuntary due to his lack of knowledge about the arrest warrant. The second is whether the district court had an obligation to inform Mock about the arrest warrant, or at least to ensure that Mock had the opportunity to consult with counsel before testifying.

(1) *Voluntariness*

Mock argues that his testimony was involuntary, in that he was deprived of information necessary for him to determine whether he should testify. He contends that his testimony was not the result of his free choice, because he would not have chosen to testify had he known that he was about to be arrested. He further argues that his testimony constituted a confession that should have been suppressed because he was never given the *Miranda* warnings for custodial interrogations.

This latter contention can be quickly dismissed. In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the Supreme Court held that the Fifth Amendment privilege against self-incrimination prohibited statements given by a suspect during "custodial interrogation" without a prior warning. The Court suggested that the *Miranda* warnings apply, however, only in the context of "incommunicado interrogation of individuals in a police-dominated atmosphere." *Id.* at 445. Moreover, the Court has since noted that "[i]t is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). In the instant case, Mock was neither in custody nor subject to official interrogation; rather, he came freely to court to testify on behalf of his colleagues. His questioning by defense counsel and the government attorney is certainly not the type of situation envisioned by the Court in *Miranda* as requiring prophylactic warnings. *See United States v. Kilgroe*, 959 F.2d 802, 804-05 (9th Cir. 1992). Consequently, he was not entitled to *Miranda* warnings prior to his testimony.

Even though Mock was not entitled to *Miranda* warnings, his statements during his testimony would still be

inadmissible in the later trial if they were made involuntarily. Under standard voluntariness analysis, we inquire "into all the circumstances surrounding the law enforcement officials' conduct to ascertain whether it overcame the accused's will to resist and brought about a confession that was not freely self-determined." *Campaneria v. Reid*, 891 F.2d 1014, 1019-1020 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 1419 (1991). Three factors are relevant to this inquiry: (1) the conduct of the law enforcement officers; (2) the conditions under which the interrogation occurred; and (3) the accused's background. *See United States v. Anderson*, 929 F.2d 96, 99 (2d Cir. 1991).

This case's singularity, however, makes this inquiry somewhat complex, because standard voluntariness analysis does not squarely apply to these facts to aid us in resolving the issue. The three factors clearly point to the admissibility of Mock's testimony, but only because the misconduct averred by Mock does not snugly fit into that three-factor examination. The first two factors anticipate stationhouse-type confessions given after questioning by police officers, not testimony given in open court pursuant to questions from attorneys. Moreover, as the district court found, even the third factor does not weigh heavily in Mock's favor because of his education and familiarity with legal procedures.

The fact that the standard *Anderson* three-factor test does not clearly point to involuntariness, however, should not end our inquiry. Voluntariness analysis is usually employed to determine whether a statement given to police in an extra-judicial proceeding can be admitted into court, and focuses on whether the police overcame the accused's free will through coercion or manipulation. The situation here, however, is very different. Here,

Mock contends that a statement given under oath in open court, at the behest not of the government but of criminal defendants, should be excluded because the district court did not have him arrested before he could testify and thereby incriminate himself. As one might anticipate, the state of the law has not developed so fully as to provide a well-established test for evaluating such a contention.

Similar arguments, however, have been rejected in the related context dealing with the voluntariness of a waiver of *Miranda* rights during custodial interrogation. The foundation for Mock's appeal on this issue is the contention that the district court or the government was under an obligation to inform him that he was subject to imminent arrest after his testimony, especially where Mock argues that he might not have testified had he known of the arrest warrant. In a comparable situation, though, the Supreme Court held that the failure of police to inform the defendant of the efforts of an attorney hired by the defendant's sister to reach him did not cause the defendant's waiver of his *Miranda* rights to become involuntary. *See Moran v. Burbine*, 475 U.S. 412, 413 (1986). *Moran* dealt specifically with the voluntariness of a waiver of *Miranda* rights, rather than the voluntariness of testimony, but the rationale is instructive for the instant case. In *Moran*, the Court held that the defendant did not need to know that an attorney had been retained on his behalf in order to "knowingly waive his Fifth Amendment rights to remain silent and to the presence of counsel." *Id.* at 413. Because the defendant did not need that information, the failure to provide the information to him did not implicate those rights.

More significantly for the instant case, the Court noted that "[e]vents occurring outside the presence of the suspect and entirely unknown to him surely can have no

bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* This is consistent with other holdings by the Supreme Court that a criminal defendant need not have perfect knowledge of all the circumstances and consequences of his waiver of Fifth Amendment rights in order for his confession to be voluntary. *See Colorado v. Spring*, 479 U.S. 564, 577 (1987) (holding that "suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily" waived Fifth Amendment privilege); *Oregon v. Elstad*, 470 U.S. 298, 317 (1985) (holding that prior unwarned statement did not undermine voluntariness of waiver of Fifth Amendment rights in subsequent statement given after warnings, stating that defendant need not have a "full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case" in order to make a voluntary confession); *California v. Beheler*, 463 U.S. 1121, 1125 n.3 (1983) (per curiam) (stating that defendant's confession was not involuntary despite defendant's argument that he was unaware of the consequences of his participation in interrogation); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (holding that defendant's confession was not involuntary even though it was made in reliance on misrepresentation by police of confession by another suspect).

We think the reasoning in the above cases can be extended to the instant one. We do not see how Mock can argue that the information withheld from him is of a higher constitutional caliber, for example, than the information withheld from the defendant in *Moran*. The fact that Mock's knowledge of his impending arrest might have induced him to choose not to testify does not mean that he was entitled to that knowledge any more than the

defendant in *Moran* was entitled to know about the retained attorney. Although it is information that Mock might have found useful, it is not information the denial of which vitiates the voluntariness of his decision to testify. This is consistent with decisions by other courts in the context of the voluntariness of a waiver of *Miranda* rights. *See Agee v. White*, 809 F.2d 1487, 1494-95 (11th Cir. 1987) (holding that where police did not take affirmative steps to mislead defendant, confession was voluntary even if defendant misunderstood consequences of confession); *Ahmad v. Redman*, 782 F.2d 409, 413 (3d Cir.) (accepting district court's findings of fact, ruling that defendant waived his rights because it was shown that he understood *Miranda* warnings), *cert. denied*, 479 U.S. 831 (1986); *Coronado v. Lefevre*, 748 F. Supp. 131, 139 (S.D.N.Y. 1990) (rejecting defendant's contention that his lack of understanding vitiated voluntariness of confession); *Brooks v. Zimmerman*, 712 F. Supp. 496, 499 (W.D. Pa. 1989) (finding that defendant's confession was voluntary where defendant argued that he did not know nature of charge against him when he confessed); *Toste v. Lopes*, 701 F. Supp. 306, 313 (D. Conn. 1987) (rejecting defendant's contention that lack of intelligence and personality disorder indicated that defendant could not understand *Miranda* warnings); *McCarthy v. Bronson*, 683 F. Supp. 880, 886 (D. Conn. 1988) (rejecting contention that confession was involuntary where defendant argued that police's promise of drug treatment induced him to confess). Simply put, Mock's lack of knowledge about the arrest warrant does not affect the voluntariness of his testimony.

We also note that there is a question whether the withheld information would have even made a difference. Mock admitted during his testimony that he was aware

that he might be arrested sometime in the future, stating that there was "always a chance" that he could be arrested for his alleged involvement in the narcotics operation, but that he wanted to clear his name. This shows that even though Mock did not have the specific knowledge of his impending arrest, he was generally aware of this danger and testified regardless. Although we find that the failure to inform Mock about the arrest warrant did not vitiate the voluntariness of his testimony, we note that his apparent understanding of his precarious situation, and disregard of this danger, is an additional basis for finding that the withholding of the information did not impact his free choice to testify.

(2) *The District Court's Obligation*

As demonstrated above, Mock's lack of knowledge about his impending arrest did not vitiate the voluntariness of his testimony. This does not, however, end our inquiry, because Mock also argues that Judge Lowe had an independent obligation in the interest of fairness to protect his constitutional rights in her courtroom. Although the government's actions in this case as an advocate were entirely proper, there is some question as to whether the district court should have intervened to protect and inform Mock of his situation or at least ensure that he was represented by counsel.

At least four other circuits have expressly held that the district court has the inherent discretion to warn a witness about his constitutional rights, especially if the court perceives that the witness might incriminate himself. *See United States v. Arthur*, 949 F.2d 211, 215-16 (6th Cir. 1991) (holding that although district court has discretion to warn witness of possibility of incriminating himself, district court abused discretion by repeatedly encourag-

ing witness not to testify); *United States v. Silverstein*, 732 F.2d 1338, 1345 (7th Cir. 1984) (holding that district court correctly exercised authority to caution witness against "inadvertent abandonment" of privilege against self-incrimination), *cert. denied*, 469 U.S. 1111 (1985); *United States v. Colyer*, 571 F.2d 941, 946 (5th Cir.) (holding that "court should be alert to any indicators that the witness wishes to invoke the privilege against self-incrimination," but that district court made harmless error in assuming witness would invoke privilege without asking), *cert. denied*, 439 U.S 933 (1978); *United States v. Morrison*, 535 F.2d 223, 228 (3d Cir. 1976) (holding that although district court correctly used its discretion to warn witness of constitutional rights, prosecutor's barrage of warnings served to intimidate witness into invoking privilege, thereby prejudicing rights of accused).

We agree that a district court certainly has the discretion to ensure that a witness in danger of unwittingly incriminating himself is aware of his constitutional privilege, but that exercise of this discretion must be carefully tailored to ensure that warnings do not become threats. A district judge warning a witness must be sure that she does not abuse that discretion by intimidating a witness into silence. *See Webb v. Texas*, 409 U.S. 95, 97-98 (1972) (per curiam) (holding that trial judge committed error when he "gratuitously singled out" one witness for lengthy and intimidating warnings about perjury); *Arthur*, 949 F.2d at 216.

In the instant case, Mock argues the converse of *Webb* and *Arthur*, that the district court abused its discretion precisely by *not* cautioning him about his constitutional privilege. At the very least, Mock argues, the district court should not be instrumental in ensuring that the witness not be aware of important facts relating to his choice

whether to take the stand. According to Mock, Judge Lowe's actions were improper in that the judge exercised her discretion not to protect Mock's rights but to conceal them.

There is no question that Judge Lowe was put into a very difficult situation by the circumstances of Mock's testimony. The judge was forced on the spur of the moment to balance the right of the defendants to put on a witness on their behalf, the governmental interest in placing Mock under arrest, and Mock's interest in perhaps being specifically aware of the arrest warrant (as opposed to his general awareness that he had been implicated in the conspiracy). We have little doubt that the ingenuity of attorneys is such that, if Judge Lowe had chosen to inform Mock of the warrant, we would now be adjudging a contention that the court's interference with the presentation of Garcia's and Rodriguez's case violated their rights to a fair trial. *See Silverstein*, 732 F.2d at 1343-44 (stating argument for defendants that district judge improperly exercised discretion to warn witness about rights).

Even though we are sympathetic to Judge Lowe's predicament, however, we are troubled by the district court's choice to deliberately delay the execution of an arrest warrant to ensure a witness's testimony at trial. There is something vaguely inappropriate about the district judge arranging matters so that Mock's testimony on behalf of the defendants would not be jeopardized by execution of the arrest warrant. Although Judge Lowe clearly had the interests of the defendants in mind, she disregarded the possibility that Mock's interests might need protection. We think that the district court would have better exercised its discretion by ensuring that Mock was represented by counsel, or to caution Mock about the con-

sequences of his testimony. Even though Mock did not have a Fifth Amendment right to the information, the district court's determination to withhold the information itself implicates concerns of fundamental fairness of the courtroom.

Ultimately, however, Judge Lowe's actions were within her discretion. Although we might disagree with Judge's Lowe's resolution of the dilemma, we must respect the judge's exercise of her inherent discretion in this matter. Mock's assertions to the contrary, the district court in this instance was under no overriding obligation to inform him of the impending arrest warrant. As was made clear in *Silverstein*, among other cases, a district judge has the discretion to caution a witness as to the relinquishing of his constitutional privilege against self-incrimination. Discretion to act, though, presupposes a discretion to *not* act. That a court has the *authority* to caution a witness does not imply that the court has an *obligation* to do so. Judge Lowe's exercise of that discretion, while perhaps imperfect, did not cause such fundamental unfairness that would require suppression of Mock's testimony.

Moreover, although we are troubled by the role taken by the district court in delaying execution of the warrant, we note that Mock was in a very real sense aware of his peril and yet chose to fabricate his entire testimony. As noted earlier, we doubt whether warnings from the district judge would have made a difference. In any event, we will not overturn the district court's exercise of its discretion absent an abuse of that discretion, and we do not find such an abuse present in this case.

For these reasons, we find that Mock was not entitled to the information withheld from him, either due to con-

stitutional guarantees or considerations of fundamental fairness.

II. *Evidence of Voluntariness of Mock's Testimony*

There is another issue raised by the admission of Mock's testimony in the first trial into evidence at the second trial. Although District Judge Leisure admitted the testimony into evidence at the second trial, he did not allow Mock to introduce the circumstances under which Mock testified. Mock had wished to demonstrate that his testimony was procured through inappropriate means in order to influence the jury to disregard the substance of his statements. He now argues that the exclusion of the evidence was an abuse of discretion, and that the district court was required to admit the underlying circumstances of his "confession" under 18 U.S.C. § 3501.

A district court judge is in the best position to evaluate the admissibility of offered evidence. *See United States v. Torres*, 901 F.2d 205, 234 (2d Cir.), *cert. denied*, 498 U.S. 906 (1990). For that reason, we will overturn a district court's ruling on admissibility only if there is a clear showing that the court abused its discretion or acted arbitrarily or irrationally. *See United States v. Cruz*, 797 F.2d 90, 95 (2d Cir. 1986); *United States v. Moon*, 718 F.2d 1210, 1232 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984).

Mock contends that 18 U.S.C. § 3501 governs the determination of whether to admit the underlying circumstances of his testimony before Judge Lowe. Specifically, Mock argues that the district court was required under § 3501(a) to "permit the jury to hear relevant evidence on the issue of voluntariness and . . . instruct the jury to give such weight to the confession as the jury

feels it deserves under all the circumstances." 18 U.S.C. § 3501(a).

Section 3501 governs the admissibility of confessions, and its applicability therefore depends on whether we can characterize Mock's testimony as a confession. Again, as noted earlier, we doubt that Mock's testimony constituted a "confession" in the actual sense. Section 3501(e), however, defines confession rather broadly: "any self-incriminating statement made or given orally or in writing." 18 U.S.C. § 3501(e). This would seem to be satisfied by Mock's prior testimony, in which he made statements that at the very least tied him to the defendants in such a way as to implicate him in their conspiracy.

Even if Mock's testimony could constitute a "confession" for purposes of §§ 3501(a) and (e), however, subsection 3501(d) limits the applicability of the entire section, stating that

> [n]othing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

18 U.S.C. § 3501(d). Subsection (d) therefore places two limitations on the applicability of the entire section: (1) if the confession was given without interrogation; and (2) if the confessor was not under arrest or detention at the time the statement was made. *See United States v. Bernett*, 495 F.2d 943, 972 (D.C. Cir. 1974) (Wilkey, *J.*, concurring) (stating that Congress's intent in § 3501(d) was to create a "broad exception to the procedural requirements of [§] 3501"); *see also United States v. Bailey*, 728 F.2d 967, 970 (7th Cir.) (citing concurrence in *Bernett*,

holding that § 3501(d) creates an exception to the procedural requirements of entire section), *cert. denied*, 467 U.S. 1229 (1984).

Both of these limitations apply in this case. Mock was subject to cross-examination during his testimony before Judge Lowe, but although an effective cross-examination can perhaps be as unpleasant as many interrogations, there is a tremendous legal distinction between the two. Moreover, as the district court found, Mock was not under arrest or detention at the time of his testimony. Mock came to court freely in order to testify on behalf of the defendants, and was unaware (as per Judge Lowe's instructions) of his imminent arrest.

Application of § 3501(d) indicates that Mock's testimony, even though possibly incriminating, is not a "confession" subject to the restrictions of the rest of the section. Therefore, the requirements of § 3501(a), which mandates among other things the admission of the underlying circumstances to voluntary confessions, are not operative to compel the district court to admit the evidence concerning Mock's testimony. *See United States v. Colon*, 835 F.2d 27, 30-31 (2d Cir. 1987) (holding that requirements of § 3501 do not apply, because statement was spontaneous and not the product of interrogation), *cert. denied*, 485 U.S. 980 (1988); *United States v. Diezel*, 608 F.2d 204, 207 (5th Cir. 1979) (holding that no voluntariness hearing required under § 3501 where statement was volunteered and was not in response to interrogation); *United States v. Vasta*, 649 F. Supp. 974, 988-99 (S.D.N.Y. 1986) (holding that a voluntariness hearing under § 3501 not required where defendant spoke out on his own, not in response to interrogation).

Mock cannot therefore rely on § 3501 to require the admission of the circumstances of his testimony in the first trial. He can only argue that the district court abused its discretion as to the relevancy of those underlying circumstances. Because we find that the district court did not abuse its discretion, we affirm the court's judgment on this issue.

III. *Charge on Alcohol Abuse*

The only other substantive claim by the appellants that requires any discussion is their contention that the district court erred in refusing to charge the jury regarding accomplice witness Valdez's alleged alcoholism. Valdez had testified through an interpreter at trial that he drank fairly heavily, three or four drinks on a given day, but that he did not drink constantly or think his drinking was a problem. This led to extensive cross-examination on his drinking habits, but Valdez stated that he never became inebriated and did not believe that drinking affected his memory.

At the close of evidence, Mock requested that the court instruct the jury that Valdez was an alcohol abuser whose testimony must be carefully scrutinized. The district court concluded that such a charge was not appropriate, because there was no evidence that Valdez used alcohol at the time the events at issue in the trial took place. The appellants now contend that this refusal to charge the jury was error.

In order to prevail on this claim, the appellants must show that their requested charge accurately represents the law, and also that the charge actually given prejudiced their rights to a fair trial. *See United States v. Ouimette*, 798 F.2d 47, 49 (2d Cir. 1986), *cert. denied*, 488 U.S. 863

(1988). They can make no such showing. There was no proof that Valdez was an alcoholic, nor proof that Valdez's drinking impacted on the events in question at trial. The jury was free to take Valdez's admitted drinking into consideration for the weight of his testimony, and also free to accept the defense's well-argued admonishments on closing argument that Valdez was an untrustworthy drunk. The jury did not, however, need a charge that it should carefully scrutinize Valdez's testimony because of his drinking, especially since the district court clearly instructed the jurors that they had the authority and responsibility to determine the credibility of witnesses based on any matter in evidence. Even in the case of a charge related to drug use, which was the instruction upon which the appellants' proposed charging language was based, the instruction obviously need not be given at the district court's discretion where there is insufficient evidence to support it. *See United States v. Dempewolf*, 817 F.2d 1318, 1321 (8th Cir.) (refusal of drug-addict charge not error where there was factual dispute over whether witness was addict), *cert. denied*, 484 U.S. 903 (1987); *United States v. Andrus*, 775 F.2d 825, 853 (7th Cir. 1985) (refusal of drug-addict charge not error where possible drug addiction of witness was subject to extensive cross-examination on issue and jury otherwise charged on credibility matters). Although Valdez's drinking was obviously a factor for the jury to consider in assessing the credibility of his testimony, the evidence did not support that he was an alcoholic or was drinking at the time of events to which he was attesting, and there was no need for a specific instruction on the matter of his alleged alcoholism. For these reasons, the appellants were not prejudiced by the district court's decision to decline to charge the jury as requested.

IV. *Other Substantive Issues*

The appellants raise a number of other substantive issues, none of which warrant further discussion. These include the appellants' claims that: the government failed to properly disclose evidence to the appellants at the first trial and at the second trial; this failure to disclose evidence should have barred retrial of the appellants under the Double Jeopardy Clause; the district court improperly evidenced favoritism to the government; the district court erred in various evidentiary rulings; the district court improperly denied Rodriguez's severance motion; and the district court improperly denied the appellants' motion for a new trial.

We have examined all of these contentions, and find them to be without merit.

V. *Sentencing Issues*

The appellants raise various claims against their sentences, none of which have merit.

A. *Life Sentences*

Mock and Garcia argue that their life sentences violate the Eighth Amendment's guarantee against cruel and unusual punishment, since they are merely middle-level drug dealers. They contend that, regardless of the Sentencing Guidelines' calculations, they are not deserving of so severe a punishment.

When reviewing a sentence imposed by the district court, "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within con-

stitutional limits." *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983). For that reason, successful challenges to the constitutionality of particular sentences are extremely rare. *See Hutto v. Davis*, 454 U.S. 370, 374 (1982).

We have previously ruled that sentences of life imprisonment for narcotics dealers are not "cruel and unusual" within the meaning of the Eighth Amendment. *See United States v. Torres*, 941 F.2d 124, 127-28 (2d Cir. 1991). Here, the appellants' sentences were based on the amount of narcotics manufactured and seized, their leadership role in the conspiracy, and, in Mock's case, obstruction of justice. Although these factors result in an undesirable sentence for Mock and Garcia, life sentences are not constitutionally disproportionate given these facts.

B. *Mock's Leadership Role*

Mock argues that the district court erred in increasing his offense level pursuant to U.S.S.G. § 3B1.1(a) for his leadership role in the conspiracy. Such a finding by the court will not be disturbed unless clearly erroneous. *See United States v. Parker*, 903 F.2d 91, 103 (2d Cir.), *cert. denied*, 498 U.S. 872 (1990).

The government presented voluminous evidence of Mock's involvement in the conspiracy. He gave workers instructions, paid salaries, collected drug proceeds, disbursed money for bills, and handled customers. He also maintained the organization's drug records, in a date book introduced at trial. Mock seizes on the fact that he did not participate in the negotiations with undercover federal agent Almonte, but that fact alone, standing by itself, does not call the district court's conclusions into question. The fact that Mock did not actively participate in one

drug transaction does not by itself show that he did not have a leadership role in the conspiracy.

C. *Obstruction of Justice*

Mock argues that the district court's imposition of a two-level increase for obstruction of justice pursuant to U.S.S.G. § 3C1.1 was unwarranted. The district court imposed the increase for Mock's perjury at the first trial before Judge Lowe, and for Mock's ultimately unsuccessful attempt to disguise his handwriting when giving exemplars under subpoena for comparison with his date book of drug records. Mock does not challenge any factual findings, but simply argues that as a matter of law the district court erred in using those two actions as a basis for the obstruction enhancement.

Section 3C1.1 provides for a two-level increase in the offense level "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." U.S.S.G. § 3C1.1. Mock argues that this section should not apply to his attempt to disguise his handwriting, because his actions should be taken into account when assigning a sentence within the particular Guideline range. As support for this proposal, Mock cites to *United States v. Restrepo*, 936 F.2d 661, 668 (2d Cir. 1991), wherein we discussed a district court's consideration of a defendant's attempt to withhold a writing exemplar when selecting a sentence within the Guideline range. This is not much support for Mock, however, because in *Restrepo* we discussed with approval the possibility of an obstruction enhancement for the exact type of behavior exhibited by Mock in this case. *See id.* at 668-69 (assuming without deciding that an obstruction enhancement would be appropriate for

withholding writing exemplars). In any event, there are few better examples of a classic obstruction of justice than a defendant who refuses to give handwriting samples when compelled by a subpoena. His disguise of his handwriting made difficult the comparison of his writing with that in the drug transactions notebook seized by the government, thus hindering the government in its investigation.

Mock also argues that his false testimony cannot be the basis of an increase because it did not relate to "the instant offense," as required by U.S.S.G. § 3C1.1. Mock notes that the perjury took place at the earlier trial, not the one at which he was convicted. The Guidelines, however, do not state that the perjury has to be committed in the instant *trial*, just in the instant *offense*. Mock committed perjury while an investigation was ongoing for the conspiracy, and he lied in order to cover up his and his co-conspirators' roles in the conspiracy. *See United States v. Irabor*, 894 F.2d 554, 556 (2d Cir. 1990) (holding that obstruction enhancement applies whether conduct occurred before or after commencement of judicial proceedings).

Mock cites to the district court opinion in *United States v. Banks*, 751 F. Supp. 1161, 1166 (M.D. Pa. 1990), *aff'd*, 931 F.2d 52 (3d Cir. 1991), wherein the court stated that the obstruction adjustment does not apply "where the defendant testifies untruthfully in the case of another defendant." In that case, though, the defendant in question committed perjury at the trial of a co-defendant who was tried simultaneously, although the defendant did not testify in his own case. The perjury, therefore, took place after the investigation of the offense for which the defendant was charged, and although it took place simultaneously to his prosecution, it was unrelated to his "instant

offense." As the district court stated, "we are of the view that the term 'instant offense' as used in the commentary and the guideline itself is probably limited to the offense or case against the defendant . . . and does not encompass the case against [the co-defendant]." *Id.* In Mock's case, however, his perjury took place during his instant offense, because he was under investigation by the government for his involvement in the conspiracy at the time that he testified at the first trial. For these reasons, the obstruction enhancement was appropriate.

CONCLUSION

We have examined all of the appellants' contentions, and find them to be without merit. For the above reasons, we affirm the judgment of the district court.

No. 93-1817

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

WASANG TOMAS MOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in permitting petitioner to testify as a defense witness at the trial of his co-conspirators without informing petitioner that a warrant had been issued for his arrest or advising petitioner of his *Miranda* rights.

2. Whether petitioner's testimony at the co-conspirators' trial was properly admitted at his own subsequent trial.

3. Whether the district court erred in refusing to allow petitioner to introduce evidence concerning the circumstances under which his testimony at the prior trial was given.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1817

WASANG TOMAS MOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A70-A96) is reported at 16 F.3d 1324.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1994. The petition for a writ of certiorari was filed on May 13, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to possess and distribute cocaine and cocaine base, in violation of 21 U.S.C. 846; possessing cocaine and cocaine base with the intent to distribute those drugs, in violation of 21 U.S.C. 841(a)(1); using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c); and perjury, in violation of 18 U.S.C. 1623. The district court sentenced petitioner to life imprisonment, with an additional five-year consecutive sentence on the firearms count. Gov't C.A. Br. 3-4. The court of appeals affirmed.

1. Between 1986 and 1990, petitioner and Jorge Garcia ran a crack and cocaine distribution organization in Manhattan. Petitioner and Garcia employed several other persons to assist them in the drug distribution operation, including Raul Rodriguez. Pet. App. A73; Gov't C.A. Br. 5-11. In April 1991, a federal grand jury in the Southern District of New York returned an indictment charging Garcia and Rodriguez with offenses arising from their involvement in the drug distribution organization. Garcia and Rodriguez were tried before United States District Court Judge Mary Johnson Lowe. Pet. App. A73; Gov't C.A. Br. 2-3.

During the trial, Garcia called petitioner to testify as a defense witness. The prosecutor informed Judge Lowe at a sidebar conference that a warrant for petitioner's arrest had been issued and requested that federal agents be permitted to execute the warrant immediately. Judge Lowe denied the request, noting that "if they execute it now, [the government] will be depriving the defendant of a defense." Pet. App. A1-A2, A75; Gov't C.A. Br. 15-16.

After excusing the jury from the courtroom, Judge Lowe conferred with the prosecutor and defense counsel. Garcia's attorney informed Judge Lowe that two other persons who had been named as co-conspirators in the indictment but had not been charged would also be called as defense witnesses and stated that he had "told all of them they might subject themselves to arrest if they come to court." Rodriguez's counsel added that he had "told them to get an attorney." Judge Lowe then arranged for petitioner to be arrested out of sight of the jury after he had testified, stating that she did not want petitioner "to be aware of the arrest warrant * * * before he has completed his testimony[,] so as not to deprive the defendants of the benefit of his testimony." Pet. App. A2-A12, A75-A76; Gov't C.A. Br. 16.

Petitioner proceeded to testify on Garcia's behalf. He denied that he was involved in drug trafficking and testified that he had known Garcia for years and had never known him to sell or use drugs. Petitioner also testified that he had visited Garcia's apartment, which the evidence showed was the headquarters of the drug distribution operation. Petitioner acknowledged that he was aware that there was "always a chance" that he would be arrested if he appeared to testify, but explained that he "wanted to 'clear [his] name.'" Petitioner was arrested outside the courtroom after his testimony. Pet. App. A76; Gov't C.A. Br. 12-13, 16.

The jury was unable to reach a verdict on the charges against Garcia and Rodriguez, and Judge Lowe declared a mistrial. Pet. App. A73; Gov't C.A. Br. 3.

2. In August 1991, a superseding indictment was returned charging petitioner, Garcia, and Rodriguez with offenses arising from their participation in the drug distribution organization. In addition, petitioner was charged with perjury based on his testimony at the trial

of Garcia and Rodriguez. The case was reassigned from Judge Lowe to Judge Peter K. Leisure. Pet. App. A73-A74; Gov't C.A. Br. 3-4.

Petitioner moved to suppress his testimony at the prior trial, claiming, among other things, that he should have been given *Miranda* warnings before his testimony and that his statements were involuntary because he was not informed that he would be arrested after he testified. Judge Leisure denied the suppression motion. He held that petitioner was "not subject to custodial interrogation" when he testified at the prior trial and therefore was not entitled to *Miranda* warnings. The court also rejected petitioner's claim that his testimony was involuntary, noting that petitioner "was clearly on notice that he had been implicated in the conspiracy at issue, and that his appearance in court posed the danger of arrest."[1] Judge Leisure concluded that because petitioner "knew he was a suspect in this case" and nevertheless "voluntarily decided to appear in [c]ourt to testify, * * * the failure to explicitly inform him of the consequences of his actions" did not render his testimony involuntary. Pet. App. A19-A33, A76-A77; Gov't C.A. Br. 32-33.

Petitioner's testimony at the first trial was admitted into evidence at the second trial. Petitioner then sought to introduce evidence concerning the circumstances under which the testimony was given, including Judge Lowe's decision that he should not be informed of the arrest warrant until after he had testified. The district court excluded that evidence, concluding that peti-

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[1] The court observed that petitioner was "no stranger to the [f]ederal criminal justice system, having already been tried once and convicted." Pet. App. A30, A76-A77.

tioner's lack of knowledge of the arrest warrant was not relevant. Pet. App. A59-A67, A77.

3. In the court of appeals, petitioner contended that his testimony at the first trial was involuntary because he was not informed of the existence of the arrest warrant and that Judge Leisure therefore erred in admitting the testimony into evidence at the second trial. The court of appeals rejected that claim, explaining that knowledge of the existence of the arrest warrant and of his imminent arrest was "information that [petitioner] might have found useful," but that the denial of that information did not "vitiate[] the voluntariness of his decision to testify." Pet. App. A82. The court also questioned "whether the withheld information would have even made a difference," observing that petitioner's testimony showed that although he "did not have the specific knowledge of his impending arrest, he was generally aware of this danger and testified regardless." *Id.* at A82-A83. Thus, the court concluded that petitioner's "apparent understanding of his precarious situation, and disregard of this danger, is an additional basis for finding that the withholding of the information did not impact his free choice to testify."[2] *Id.* at A83.

Petitioner also claimed that Judge Lowe had "an independent obligation in the interest of fairness" to inform him of the existence of the arrest warrant before he testified. Pet. App. A83. The court of appeals

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[2] The court of appeals also rejected petitioner's claim that his testimony should have been suppressed because he was not given *Miranda* warnings before he testified. The court explained that petitioner "was neither in custody nor subject to official interrogation; rather, he came freely to court to testify on behalf of his colleagues." Pet. App. A78.

concluded, however, that Judge Lowe "was under no overriding obligation to inform [petitioner] of the impending arrest warrant" and that she acted within her discretion in withholding that information from petitioner. *Id.* at A86. Noting that "a district judge has the discretion to caution a witness as to the relinquishing of his constitutional privilege against self-incrimination," the court explained that "[d]iscretion to act, though, presupposes a discretion to *not* act. That a court has the *authority* to caution a witness does not imply that the court has an *obligation* to do so." *Ibid.* Although the court of appeals was "troubled by the district court's choice to deliberately delay the execution of an arrest warrant to ensure a witness's testimony at trial," it concluded that Judge Lowe's actions did not result in "fundamental unfairness that would require suppression of [petitioner's] testimony." *Id.* at A85-A86.

Finally, petitioner claimed that Judge Leisure erred in refusing to allow him to introduce at the second trial evidence concerning the circumstances under which his testimony at the first trial was given. Petitioner relied on 18 U.S.C. 3501(a), which provides that once a trial judge determines that a "confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." The court of appeals rejected petitioner's claim, concluding that Section 3501 was inapplicable in determining the admissibility of the underlying circumstances of petitioner's trial testimony. Pet. App. A88-A90. The court explained that 18 U.S.C. 3501(d) limits the applicability of Section 3501 by excluding from its coverage

confessions that were "given without interrogation" or given by persons who were "not under arrest or detention at the time the statement was made."[3] Pet. App. A88. Because petitioner was not subject to "interrogation" or "under arrest or detention" during his trial testimony, the court stated, "[b]oth of these limitations [set forth in Section 3501(d)] apply in this case." *Id.* at A89. The court concluded that petitioner "cannot therefore rely on § 3501 to require the admission of the circumstances of his testimony in the first trial." *Id.* at A90.

ARGUMENT

1. Petitioner contends (Pet. 10-20) that Judge Lowe was required to advise him of his right to counsel and right against compulsory self-incrimination before permitting him to testify at the trial of his co-conspirators. The court of appeals correctly concluded, however, that Judge Lowe acted within her discretion in allowing petitioner to testify without advising him of his rights. Courts have agreed that "[t]he district court has the discretion to warn a witness about the possibility of incriminating himself." *United States* v. *Arthur*, 949 F.2d 211, 215 (6th Cir. 1991); see also *United States* v. *Smith*, 997 F.2d 674, 680 (10th Cir.), cert. denied, 114 S. Ct. 357 (1993); *United States* v. *Silverstein*, 732 F.2d 1338, 1344-1345 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Morrison*, 535 F.2d 223, 228 (3d Cir. 1976). As the court of appeals explained (Pet. App.

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[3] Section 3501(d) provides that "[n]othing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention."

A86), the district court also has discretion not to provide such a warning: "That a court has the *authority* to caution a witness does not imply that the court has an *obligation* to do so." Thus, no court has held that the district court is required to warn witnesses of the danger of self-incrimination; to the contrary, "as a general rule there is no duty to advise a *witness* in court * * * of his right not to incriminate himself." *United States* v. *Morrison*, 535 F.2d at 228.[4]

2. Petitioner also contends (Pet. 20-26) that his testimony at the first trial was involuntary because he was unaware of his imminent arrest when he testified. This Court has made clear, however, that a defendant need not be aware of all of the circumstances and consequences of his actions in order for his confession to be voluntary. See *Oregon* v. *Elstad*, 470 U.S. 298, 316 (1985) ("This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness"); see also *Colorado* v. *Spring*, 479 U.S. 564, 576-577 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 422-424 (1986). Thus, petitioner's lack of knowledge of the warrant for his arrest was a factor that the courts below could consider in evaluating the voluntariness of petitioner's testimony, but was not sufficient by itself to render his testimony

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[4] The court of appeals also correctly rejected petitioner's claim that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), required the district court to advise him of his rights before permitting him to testify at the first trial. Because petitioner was not in custody or subject to interrogation during his trial testimony, he was not entitled to *Miranda* warnings. See *United States* v. *Kilgroe*, 959 F.2d 802, 804-805 (9th Cir. 1992) ("putative defendant" who was subpoenaed to testify as defense witness and subjected to cross-examination by prosecutor was not entitled to *Miranda* warnings before testifying).

involuntary. Cf. *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969) (fact that police officer questioning defendant misrepresented statements of another suspect was "insufficient * * * to make [the defendant's] otherwise voluntary confession inadmissible").

Moreover, in ruling that petitioner's trial testimony was voluntary, the district court specifically found that petitioner "was clearly on notice that he had been implicated in the conspiracy at issue, and that his appearance in court posed the danger of arrest." Pet. App. A19. The court of appeals agreed that petitioner was "generally aware" of the danger that he would be arrested and "testified regardless."[5] *Id.* at A83. Under the circumstances of this case, including petitioner's "apparent understanding of his precarious situation, and disregard of this danger" (*ibid.*), the court of appeals correctly concluded that petitioner's ignorance of his imminent arrest did not render his testimony involuntary. That fact-bound determination warrants no further review.

Petitioner also asserts (Pet. 22-24) that Judge Lowe had a "legal and moral duty" to advise him of the existence of the arrest warrant and that her failure to do so caused his testimony to be involuntary. He cites Fed. R. Crim. P. 4(c), which provides that an arrest warrant shall "command that the defendant be arrested and brought before the nearest available magistrate judge,"

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[5] Although petitioner appears to challenge the finding of both courts below that he was aware of the danger of arrest when he testified at the first trial (Pet. 24-25), he provides no basis for further review of that factual determination. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *District Director*, 385 U.S. 630, 635 (1967).

and Fed. R. Crim. P. 5(a), which requires an "officer making an arrest under a warrant" to "take the arrested person without unnecessary delay before the nearest available federal magistrate judge." Petitioner claims (Pet. 23-24) that these provisions required Judge Lowe to have the warrant immediately executed and petitioner arraigned.

Petitioner's reliance on Rules 4(c) and 5(a) is misplaced. The requirement of Rule 4 that the warrant shall "command that the defendant be arrested" refers to the form of the warrant, not the timing of its execution. Similarly, the reference in Rule 5 to "unnecessary delay" addresses the procedure to be followed after a defendant has been arrested for a federal crime. Cf. *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1603-1604 (1994). It confers no rights on a defendant as to the timing of an arrest. Cf. *Hoffa* v. *United States*, 385 U.S. 293, 309-310 (1966).

3. Finally, petitioner renews his claim (Pet. 27-35) that 18 U.S.C. 3501(a), which provides that a district court must "permit the jury to hear relevant evidence on the issue of voluntariness" of a "confession" that is admitted into evidence, required Judge Leisure to admit evidence at the second trial concerning the circumstances under which his testimony at the first trial was given. The court of appeals correctly held (Pet. App. A88-A89), however, that 18 U.S.C. 3501(d) creates an exception to the requirements of Section 3501 for confessions "given without interrogation" or given by persons who were "not under arrest or detention at the time the statement was made."[6] See *United States* v.

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[6] *United States* v. *Kampiles*, 609 F.2d 1233 (7th Cir. 1979), cert. denied, 446 U.S. 954 (1980), on which petitioner relies (Pet. 30), is not to the contrary. In that case, the court applied Section 3501 to

Alvarez-Sanchez, 114 S. Ct. at 1604 (defendant who has been arrested by state officers may not claim protections of Section 3501, which covers only those under "arrest or other detention" for a *federal* crime, citing, *inter alia*, 18 U.S.C. 3501(d)); *United States* v. *Poschwatta*, 829 F.2d 1477, 1482 (9th Cir. 1987) (upholding district court's determination that Section 3501 "contemplated custodial interrogation" and that defendant's statements during telephone conversation with federal agents "did not come within the scope of the statute"), cert. denied, 484 U.S. 1064 (1988); *United States* v. *Bailey*, 728 F.2d 967, 970 (7th Cir.) (Section 3501(d) "creates an exception to the procedural requirements of section 3501"), cert. denied, 467 U.S. 1229 (1984); *United States* v. *Diezel*, 608 F.2d 204, 207 n.6 (5th Cir. 1979) (same); *United States* v. *Bernett*, 495 F.2d 943, 972 (D.C. Cir. 1974) (Wilkey, J., concurring) (same). Because petitioner was not subject to custodial interrogation when he testified at the first trial, Section 3501 was inapplicable to petitioner's testimony.

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statements made by the defendant in response to questioning by FBI agents during meetings at an FBI field office, which the court of appeals "assum[ed]" were "custodial in character." 609 F.2d at 1242.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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